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No. 48

In the Supreme Court of the United States

OCTOBER TERM, 1955

COMMUNIST PARTY OF THE UNITED STATES OF
AMERICA, PETITIONER

v.

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

SIMON E. SOBELLOFF,
Solicitor General,

WILLIAM F. TOMPKINS,
Assistant Attorney General,

HAROLD D. KOFFSKY,
PHILIP R. MONAHAN,

Attorneys,
Department of Justice,
Washington 25, D. C.

GEORGE R. GALLAGHER,
General Counsel, Subversive Activities Control Board,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 48

**COMMUNIST PARTY OF THE UNITED STATES
OF AMERICA, PETITIONER**

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR RESPONDENT

OPINIONS BELOW

The majority (Op. 1-76, R. 2078-2153)¹ and dissenting (Op. 76-89, R. 2153-2166) opinions in the Court of Appeals are reported at 223 F. 2d

¹ "R." will be used to refer to the printed record, which consists of the Joint Appendix to the parties' briefs in the Court of Appeals and the proceedings in that court. "Tr." will be used, where necessary, to refer to the original type-written transcript of the proceedings and evidence before the Subversive Activities Control Board. For the Court's convenience, references to the opinions in the Court of Appeals will include both the "R." reference and the page number or numbers of the pamphlet copy (which we shall indicate by "Op.").

531. The Report of the Subversive Activities Control Board appears at R. 1-137 [1803-2051].²

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 2167), and a petition for rehearing was denied on January 14, 1955 (*ibid.*). The petition for a writ of certiorari was filed on April 13, 1955, and was granted on May 31, 1955 (R. 2169). The jurisdiction of this Court rests on 28 U. S. C. § 1254 and § 14 (a) of the Subversive Activities Control Act (see Pet. Br. 260-261).

QUESTIONS PRESENTED

The questions urged, some of which, however, as we suggest in this brief, may be premature at this time, are:

1. Whether the hearing and registration provisions of the Subversive Activities Control Act,

² The Report as it appears at R. 1-137 is the unannotated version, published as Sen. Doc. No. 41, 83d Cong., 1st sess. At R. 1803-2051 it appears in annotated form, *i. e.*, with record references keyed to the Joint Appendix below (which Joint Appendix, together with the proceedings in the court below, see fn. 1, *supra*, comprise the printed record referred to as "R."). The annotated version was filed in the court below as a special appendix to respondent's brief. Whenever we have occasion to refer to the Board's Report, we shall refer to both versions in the manner indicated in the text, *i. e.*, with the reference to the annotated version appearing in brackets immediately following the reference to the unannotated version.

as applied to petitioner, violate the First Amendment.

2. Whether the registration provisions of the Act and the Board's order directing petitioner to register as a Communist-action organization are invalid as violative of the Fifth Amendment's prohibition against compulsory self-incrimination.

3. Whether the registration provisions violate due process on the ground that, allegedly,—

(a) the Act predetermines by legislative fiat petitioner's liability to registration so as to render the proceedings before the Board a mere formality;

(b) the Act establishes a Board which is necessarily biased against petitioner;

(c) the Act authorizes a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions;

(d) under § 5 of the Communist Control Act of 1954 it is impossible for petitioner to know whom to register as members; and

(e) the Act makes possible an "astronomical accumulation" of penalties by making each day of failure to register a separate offense.

4. Whether the sanction provisions of the Act, individually or collectively, together with the registration provisions, violate the First Amendment by in effect "outlawing" petitioner and thus sup-

pressing and restricting its freedom of "peaceful," "non-seditious" political advocacy.

5. Whether the member-sanction provisions of the Act deprive petitioner's members of due process by penalizing innocent and unknowing memberships and associations.

6. Whether the sanction provisions make of the Act a bill of attainder.

7. Whether the Board and the court below correctly construed and applied the evidentiary considerations enumerated in § 13 (e) of the Act, which the Board is directed to take into consideration in determining whether an organization is a Communist-action organization.

8. Whether the Board's finding that petitioner is a Communist-action organization is based upon past conduct of petitioner which was discontinued prior to the date of the Act, or whether it is based upon proof as to its current practices and activities as illuminated by its past history.

9. Whether the Board's conclusion that there exists a world Communist movement, having the characteristics described in § 2 of the Act, is, as held by the Court of Appeals, supported by the preponderance of the evidence.

10. Whether the Board's findings are supported by relevant, competent evidence, and whether the Court of Appeals correctly affirmed the Board's order, notwithstanding the fact that it modified two of the subsidiary findings of the Board.

11. Whether petitioner was accorded a fair hearing before the Board.

12. Whether the Court of Appeals properly exercised its discretion in denying petitioner's motion for leave to adduce additional evidence before the Board.

13. Whether the recess appointments of three of the members of the Board were valid originally and continued to be valid until Senate confirmation of their nominations during the next session of Congress, and whether in any event the order under review is valid, it being undisputed that the Board was properly constituted at the time of the order and from a date early in the course of the hearings herein.

STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of [September 23,] 1950, c. 1024, 64 Stat. 987, 50 U. S. C. §§ 781 *ff.*), as amended, the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, and the Communist Control Act of [August 24,] 1954, c. 886, 68 Stat. 775, are set forth in the Appendix to petitioner's brief (Br. 225-270).

STATEMENT

A. The proceedings before the Board.—On November 22, 1950, the Attorney General, pursuant to § 13 (a) of the Subversive Activities Control Act of 1950, filed with the respondent Subversive Activities Control Board a petition (R. 143-159)

for an order requiring the present petitioner, the Communist Party of the United States, to register with him as a Communist-action organization in the manner required by § 7 (a), (c), and (d) of the Act. The petition alleged that the Party was a Communist-action organization as defined in the Act (§ 3 (3)), and set forth numerous allegations of fact in support of the contention.

On February 14, 1951, petitioner filed "under protest" an answer denying generally that it was a Communist-action organization as defined in the Act (R. 160-161). The answer cited the fact that there was then pending in the United States District Court for the District of Columbia a suit to enjoin further proceedings before the Board (*ibid.*). Petitioner reserved the right to amend its answer in the event of an adjudication in the pending court proceeding that an answer was required (*ibid.*). On February 28, 1951, a statutory three-judge court, in the proceeding referred to, denied the injunctive relief prayed for. *Communist Party of the United States v. McGrath*, 96 F. Supp. 47.³ On March 13, 1951, the

³ The court (Letts and Pine, D. JJ.) based its decision on the grounds that petitioner had not exhausted its administrative remedies and that "the public interest is paramount to any threatened loss or damage" to petitioner "pending final determination of the case" (96 F. Supp. at 47). Circuit Judge Bazelon, concurring in the result, based his position on his determination that the Act was not unconstitutional on its face and that no circumstances appeared to warrant the intervention of a court of equity at that stage (*id.* at 47-53).

District Court issued an order staying answer and hearings before the Board to and including March 27, 1951, pending appeal (R. 1 [1804-1805], fn. 1). On March 26, 1951, this Court denied a petition for an extension of this stay (*ibid.*; see 340 U. S. 950). The suit was thereafter abandoned by petitioner (*ibid.*).

On April 3, 1951, petitioner filed an amended answer to the Attorney General's petition (R. 161-187), in which, *inter alia*, it admitted that it was organized in 1919 and had been in existence continuously since that date (R. 162), but again denied being a Communist-action organization as alleged in the Attorney General's petition (*ibid.*).

On April 23, 1951, hearings for the purpose of taking evidence commenced before three members of the Board sitting as a hearing panel (R. 1[1805]). On October 20, 1951, one member of the panel, Charles M. LaFollette, became unavailable to the Board by virtue of the adjournment of Congress without taking action on his nomination (*ibid.*). The hearing proceeded before the remaining two members of the panel, Peter Campbell Brown and Dr. Kathryn McHale, who were present at and participated in the entire hearing (*ibid.*). On October 23, 1951, petitioner moved the Board for an order striking all evidence theretofore received and all proceedings theretofore held because of the failure of the Senate to confirm panel member LaFollette and be-

cause of alleged bias and prejudice of the panel against petitioner (R. 1-2[1805]). The motion was denied following oral argument (R. 2[1805]). Petitioner thereupon instituted proceedings in the United States District Court for the District of Columbia to enjoin continuation of the hearings (*ibid.*; *Communist Party of the United States v. Peter Campbell Brown, et al.*, unreported, Civil No. 4648-51). That court, on February 15, 1952, granted the Board's motion to dismiss this suit (R. 2, fn. 2 [1805]).

The hearings ended on July 1, 1952. Briefs and proposed findings of fact were filed by each party on July 28, 1952, reply briefs were filed on August 6, 1952, and oral argument was held before the hearing panel on August 14, 1952. On October 20, 1952, the panel issued its recommended decision finding petitioner to be a Communist-action organization and recommending that the Board order it to register as such. On November 21, 1952, the Attorney General filed certain exceptions to the recommended decision, requesting that the Board adopt the panel's findings with some minor changes of text. On November 24, 1952, petitioner filed its exceptions to the recommended decision. Oral argument on the exceptions was held on January 7, 1953. (R. 2[1805-1806].)

On April 20, 1953, the Board issued its Report (R. 1-137 [1804-2051]) and order (R. 138[2052])

directing petitioner to register in accordance with the finding that it was a Communist-action organization. The Report was unanimous. It was signed by three members of the Board (R. 132 [2042]). The fourth and only other then member of the Board^{*} filed a short concurring opinion in which he stated that he was "fully in accord with and concur[red] in the findings and in the determination that [petitioner] is a Communist-action organization under subsection (3) of Section 3 of the Act and required to register as such under Section 7" (R. 133[2042-2043]).

"Upon the overwhelming weight of the evidence in this proceeding," the Report concluded, "we find that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in § 2 of the Act; and that [petitioner] operates primarily to advance the objectives of such world Communist movement" (R. 132[2042]). Under § 3 (3) of the Act, this finding brought petitioner within the definition of a "Communist-action organization." The evidence on which the Board's finding was based is set forth in detail in the Report at R. 4-128 [1810-2034], the bracketed reference containing the Board's annotations, *i. e.*, supporting references to the testimony and exhibits. See fn. 2,

^{*} While the Board is normally composed of five members, there was then a vacancy.

supra, p. 2. The Board's Report summarizes the evidence on both sides. Where issues of credibility are met on important points, the Board has recorded its position. Similarly, where there are conflicts in testimony on particular issues, the Board has resolved them. In addition, the opinion of the Court of Appeals contains a briefer but still comprehensive summary of the evidence (Op. 48-75, R. 2125-2152). There is therefore, we believe, no need to attempt to summarize in this brief the voluminous evidence supporting the Board's particular findings and ultimate finding. Reference to the findings of fact in the annotated Report (R. 1810-2034) will enable this Court, to the extent it feels it necessary to do so, to correlate the comprehensive factual data set forth therein with the record testimony and exhibits, without the necessity of reading an additional statement of the evidence. See also *infra*, pp. 209-261.

B. Proceedings before the court below.—On June 17, 1953, petitioner, pursuant to § 14 (a) of the Act, filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review (R. 139-142) of the Board's order.

Following submission of the case on briefs and oral argument, petitioner, on August 11, 1954, filed in the Court of Appeals a motion for leave to adduce additional evidence before the Board (R. 2053-2066; see *infra* pp. 277-279),

and on August 20, 1954, a memorandum in opposition to this motion was filed (R. 2067-2076; see *infra*, pp. 279-282). The motion was denied without opinion in an order entered December 23, 1954 (R. 2077). See *infra*, pp. 277-285.

On September 13, 1954, the Court of Appeals set the case for re-argument, the order directing counsel to "address themselves primarily to (1) the validity of the Internal Security Act of 1950 if it be deemed to be not merely a registration statute, that is if it be considered an integrated whole, including the so-called sanction provisions and (2) the effect, if any, of the Communist Control Act of 1954 [which had been enacted on August 24, 1954, after the original submission of the case], upon the order here under review" (R. 2076-2077).

On December 23, 1954, following the submission of further briefs and oral argument, the order of the Board was affirmed, Judge Bazelon dissenting (R. 2167). The court, while modifying two of the Board's subsidiary findings of fact (Op. 72, 73-74, R. 2149, 2150-2151; see *infra*, pp. 257-261), held, after a painstaking review of the evidence (Op. 48-75, R. 2125-2152), that the "ultimate finding of the Board"—i. e., that petitioner "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act" and "operates primarily to advance

the objectives of such world Communist movement"—"is supported by the basic findings which in our opinion supported by a preponderance of the evidence, and that the ultimate finding is itself supported by a preponderance of the evidence" (Op. 75-76, R. 2152-2153). The court also held that the Communist Control Act of 1954, except insofar as it amended the Subversive Activities Control Act,^a had no application to this proceeding (Op. 48, R. 2125). The dissenting judge, being of the view that the registration provisions of the Act were unconstitutional as violative of the Fifth Amendment's prohibition against compulsory self-incrimination (Op. 76-89, R. 2153-2166), did not consider any of petitioner's other contentions (Op. 89, R. 2166).

SUMMARY OF ARGUMENT

I

Consideration of the problems which led to the enactment of the Subversive Activities Control Act will tend to show the reasonableness of the Act, particularly as applied to petitioner, and thus to refute the contention that it arbitrarily invades basic constitutional liberties.

^a The court's qualifying phrase—"[i]n respects other than those already discussed" (Op. 48, R. 2125)—refers to its footnote 48 at Op. 30, R. 2107, where it discusses the repeal of §§ 5 (c) and 6 (c) of the Subversive Activities Control Act by § 7 (c) of the Communist Control Act.

By 1939, Congress had before it a mass of evidence, collected over the previous nine years, pointing to the conclusion that the Communist International and the Communist Party of the United States were dedicated to the establishment of a proletarian dictatorship by force and violence in this country and throughout the world, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. The weapons adopted by Congress to combat this evil included the Smith Act of 1940, punishing advocacy of or conspiracy to advocate the overthrow of this Government by force and violence (sustained as against eleven leaders of petitioner in *Dennis v. United States*, 341 U. S. 494), the Foreign Agents Registration Act of 1938 (considered in *Viereck v. United States*, 318 U. S. 236), and the 1940 Voorhis Act. The two latter Acts were aimed at the dissemination in this country of unidentified foreign propaganda, the remedy adopted being compulsory identification and disclosure.

For various reasons these Acts could not be effectively enforced against organizations, such as petitioner, which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control. For example, petitioner, at its 1940 national convention, adopted a resolution "dissolving" its affiliation with the Communist International "for the

specific purpose of removing itself from the terms of the so-called Voorhis Act." In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations which were believed (with reason) to be subversive but which veiled their true ends behind a facade of respectability. The Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States.

The post-World War II revelations of widespread espionage and infiltration of sensitive government agencies in Canada, England, and the United States by Soviet agents, recruited from the membership of the domestic Communist parties in those countries, showed more clearly the nature and dimensions of the danger. In addition, the evidence adduced at the trial and conviction in 1949 of the eleven leaders of the American Communist Party under the Smith Act, and the commencement of hostilities in Korea in June 1950, furnished Congress with further reason to believe, in September 1950, when the Act in issue was passed, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United States.

II

The Subversive Activities Control Act is constitutional as applied to petitioner.

A. *The hearing and registration provisions.*—1. The First Amendment does not prohibit Congress from requiring registration of, and disclosure of information by, domestic organizations dominated by foreign agencies whose purpose it is to establish a Communist dictatorship in this country. The freedoms guaranteed by the First Amendment are not absolute. Even direct limitations on those freedoms are permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *A fortiori*, those freedoms may be indirectly restrained in proper circumstances.

This Court has many times sustained statutes which placed indirect restraints on freedom of speech or of the press, where the statute's objective lay within the power of Congress or a state to bring about, and the restraint was a necessary and appropriate concomitant of the exercise of the power. Examples are the Hatch Act (*United Public Workers v. Mitchell*, 330 U. S. 75), the Federal Regulation of Lobbying Act (*United States v. Harriss*, 347 U. S. 612), the Federal Corrupt Practices Act (*Burroughs and Cannon v. United States*, 290 U. S. 534), the non-

Communist affidavit clause of the amended National Labor Relations Act (*American Communications Assn. v. Douds*, 339 U. S. 382), the ownership-disclosure requirements of the postal laws (*Lewis Publishing Co. v. Morgan*, 229 U. S. 288), and a state statute regulating associations having oath-bound memberships (*Bryant v. Zimmerman*, 278 U. S. 63). The Foreign Agents Registration Act (see *Vicereck v. United States*, 318 U. S. 236, particularly the dissenting opinion of Mr. Justice Black, with whom Mr. Justice Douglas concurred, 318 U. S. at 251) is another illustration of a statute of this type. It is settled, too, that newspaper companies and radio broadcasting stations are subject to regulation in the public interest, notwithstanding the indirect restraints on freedom of speech and of the press which flow from such regulation.

The various evils at which the statutes thus sustained were aimed, grave as they were, are dwarfed in comparison to the evil at which the Act at bar strikes—the threatened destruction, through force, violence, and deceit, of our constitutional form of government and the subjection of the nation to the domination and control of a foreign dictatorship. In the light of that evil, the registration requirements do not invalidly restrict free speech, press, or association. The rationale underlying this Court's decisions sustaining "disclosure" statutes is that it is in the

interest of both free speech and free association that Congress and the public be adequately and correctly informed, at least where the dangers stemming from non-disclosure are serious. In the light of our knowledge of the world Communist movement and of the danger it presents to the nation, the device of registration and disclosure can properly be applied to the Communist Party, now that it has been found, after full hearing, to be directed and controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement.

2. Neither the registration provisions of the Act nor the Board's order violates the Fifth Amendment's prohibition against compulsory self-incrimination.

(a) The privilege applies only to natural individuals, of whom there is none before the Court at this time. The present case is therefore not a proper vehicle for the litigation of self-incrimination issues.

(i) The privilege must be personally and explicitly claimed. There has been no claim of privilege thus far, and there may never be one. Since this Court does not anticipate constitutional issues, petitioner's attempt to litigate the self-incrimination issue in this case, before it is raised, is premature. The officers of petitioner who will have the duty to effect its registration

when the registration order becomes final will be able to claim their privilege on the registration form required to be filed with the Attorney General. The question of the validity of the claim, ~~if its~~ validity is disputed, can then be litigated.

There are several reasons, moreover, why it cannot justifiably be assumed at this time that a substantial claim of privilege will inevitably be made and be required to be honored when petitioner is confronted by the statutory requirement that it register, after the order becomes final.

The top officials of petitioner, who are the ones who will have the duty of filing the registration statement, have never attempted to conceal their membership and places of leadership in petitioner. A claim of privilege on their part would be on a different footing from a similar claim by a person not publicly and indisputably known as a Communist Party member. The privilege presupposes a real danger of legal detriment arising from disclosure. *Rogers v. United States*, 340 U. S. 367. Relevant to the issue of the *bona fides* of a claim of privilege against self-incrimination would be the fact that under the Act neither the holding of office nor membership in a Communist organization shall constitute *per se* a violation of any criminal statute, and

the further fact that the registration of any person under the Act as an officer or member may not be received in evidence against him in any prosecution for any alleged violation of any criminal statute. Moreover, two of the members of petitioner's National Committee voluntarily testified in this very case and admitted their high official positions; they may thereby have waived any privilege. Whatever the merits of these hypothetical questions, their determination should await their being maturely raised.

(ii) Even assuming, moreover, that a claim of privilege will be made and that when made it will be required to be honored; this would make the order to register at most unenforceable, not void. This non-enforceability would not affect the "sanctions" which come into effect when an order to register becomes final; and Congress could certainly remove the barrier to non-enforceability by a grant of immunity. Furthermore, an important public function is served by the Board's finding that petitioner is a Communist-action organization and should register, regardless of whether the registration can actually be effected.

(b) If the Court should reject our argument that it need not and should not now pass upon the issue of whether an officer of petitioner can validly claim the privilege as a ground for not

registering petitioner, and should desire to determine that issue in this proceeding, our position would be that the privilege is not available to such officers, under the rationale of *United States v. White*, 322 U. S. 694—that an officer of an organization who has custody of its records, if called upon to produce them pursuant to a subpoena, may not lawfully refuse even if they would tend to incriminate him personally. The rationale of this decision is not inapplicable on the ground that in that case physical records were in question, while the issue here is the compulsory submission of a registration statement containing the names and addresses of officers and members of petitioner and an accounting of moneys received and expended. The data required to be contained in the registration statement are reproductions of or extracts from organization records. If the officer can be compelled to produce the physical records, he can be compelled to transpose their pertinent data to a registration form. Any valid privilege as to personal information can be claimed on the registration form. Cf. *United States v. Sullivan*, 274 U. S. 259.

(c) The validity of the personal registration requirements of § 8 is not in issue since no individual member of petitioner has been required to register and none is before the Court.

3. The registration provisions are in accord with due process.

(a) The Act does not predetermine petitioner's liability to registration so as to render the proceedings before the Board a formality; nor does it contain any "built-in" finding against petitioner. Petitioner's contrary argument ignores the crucial language in the § 3 (3) definition of a "Communist-action" organization. Under that definition, a domestic organization which is not substantially controlled by the foreign government or group controlling the world Communist movement, or which does not operate primarily to advance the objectives of that movement, is not a Communist-action organization and is not subject to the registration and other provisions of the Act, regardless of how "communistic" its philosophy might be, or how deep might be its bonds of sympathy and kinship with the foreign government or organization. The important point is that Congress required proof, which it made subject to judicial review, of the two fundamental operative facts (referred to above) by a preponderance of the evidence in proceedings before the Board, before the obligation to register or any other requirement of the Act could become effective.

Due process does not require that the congressional findings in § 2 as to the existence of a world or an American Communist movement be the subject of redetermination before the Board. These are general legislative findings supporting

the Act as a whole and not *adjudicative* facts forming the basis for an order against an individual organization. This Court has specifically recognized the general adequacy of these legislative findings. *Galvan v. Press*, 347 U. S. 522; *Carlson v. Landon*, 342 U. S. 524.

(b) The Act does not establish a Board which is "necessarilly biased" against petitioner. Petitioner's contention to the contrary in effect charges that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office. But courts should not assume in advance that an administrative hearing may not be fairly conducted, particularly where, as here, full opportunity for judicial review is afforded by the Act. *Fahey v. Mallonee*, 332 U. S. 245.

(c) The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions. The Act establishes no tests or criteria of whether an organization is a Communist-action group other than the test established by the definition of such an organization in § 3 (3) (see *supra*, p. 21; *infra*, p. 69), which petitioner concedes to be "definite and meaningful." The eight factors itemized in § 13 (e) are merely evidentiary considerations which the Act directs the Board to take into account in determining whether an organization meets the § 3 (3)

definition. When these factors are thus correctly understood they are all rational and probative with respect to the decisive issue presented by the definition. And the fact that Congress directed the Board to "take into consideration" ~~the~~ ^{to the} extent to which" the § 13 (e) factors are true or applicable with respect to a given organization does not render vague the ultimate standard of § 3 (3). Cf. *Opp Cotton Mills v. Administrator*, 312 U. S. 126; *Bowles v. Willingham*, 321 U. S. 503.

(d) The Communist Control Act of 1954 does not make it impossible for petitioner to know who its members are. Section 5 of that Act does not establish "criteria" for determining membership in petitioner any more than § 13 (e) of the Act at bar establishes "criteria" for determining whether an organization is a Communist-action group. The purpose of § 5 is merely to list items of evidence to be considered in reaching the ultimate factual conclusion of knowing membership. Petitioner's attempt to depict § 5 as a trap for the unwary disregards the nature of the listed items as nonexclusive evidentiary factors and ignores the further provision of § 5 that the determination by "the jury" of the issue of knowing membership shall be "under instructions from the court". Moreover, the language of § 5 shows that it has no application to or connection with petitioner's duty under this Act to file a registration

statement listing its members, or to possible criminal proceedings against it or its officers for wilfully omitting the names of any members in such a statement.

(e) The validity of the provision making each day of failure to register a separate offense is not presented in this proceeding, since the penalty may never be applied to petitioner. In any event, the provision is valid. There can be no "astronomical accumulation" of penalties unless an organization which has been finally ordered to register chooses to incur them by continued deliberate noncompliance with a Board order which has been judicially sustained. It is settled that the extent of the permissible punishment impossible under an otherwise valid statute is a matter of exclusive legislative discretion.

B. The sanction provisions.—Immediately upon the registration of an organization under the Act, or when an order of the Board requiring an organization to register becomes final (after judicial review), certain "sanctions", or legal disabilities, automatically occur.

1. Petitioner contends that the sanctions, considered individually and collectively together with the "public opprobrium" which results from a registration order, make the Act one of "outlawry" and, as such, restrict and suppress its freedom of peaceful political advocacy, in violation of the First Amendment. If the validity of

these sanctions is now properly before the Court, our position is that they are reasonable and valid, considered in the light of the evil at which the Act strikes.

(a) *Sanctions applicable to organizations as such.*—(i) When an organization is registered or has been finally ordered to register, it must label its mailed literature and identify its broadcasts as emanating from a "Communist organization". Such labeling imposes no censorship on any mailed matter or broadcast material; the content of either is immaterial. What the provisions do is not to censor the "speech", but to identify the "speaker". If such revelation interferes with the purposes of an organization by destroying its anonymity and disclosing its true nature, it is because of the unpopularity of the organization in the free market of ideas.

The decisions of this Court teach that such disclosure and labeling requirements may be validly imposed in order to serve a proper purpose. See *supra*, pp. 15-16). And what we have in this case is the Communist Party, foreign-controlled and engaged, among its other activities, in widespread propaganda on behalf of its ultimate objective of domination by the world Communist movement and the Soviet Union. Much of its propaganda is covert, and all of it attempts to sell itself to the public as peaceful and lawfully inspired. Theoretically, if everyone had the

time and talent to be able to make an independent evaluation of the truth or soundness of each political utterance with which he is propagandized, he would have no need to know from what source the propaganda came. But as a practical matter this independent determination is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate. And nowhere is the need for disclosure of the true source of propaganda more pressing than in the case of a Communist-action organization. In the light of the allegiance of American Communists to a foreign power and their ultimate goal, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, the requirement that the Communist Party identify its propaganda as emanating from a "Communist organization" is justified. Such identification does not limit freedom of expression, but adds to the relevant facts in the market-place of competing ideas.

Petitioner can have no valid objection to being required to identify itself as "The Communist Party, a Communist organization". An organization subject to the labeling requirements of this Act is one that has been found, after a full hearing (including judicial review), to be the puppet of a foreign power, working to achieve

the ends of that power. It is not "just another political party". When an agency of the world Communist movement poses tactically as a benign domestic organization and champion of constitutional liberties, while concealing its ultimate strategy of foisting a communistic dictatorship on the nation in a Czechoslovakia-type coup—as soon as its leaders are in positions of sufficient power and the ranks of its lesser members have been sufficiently strengthened by the duped victims of its propaganda.—Congress can act to defeat the strategy by compelling the truthful identification of the source of the propaganda.

(ii) The Act's disallowance of deductions for tax purposes of contributions to any organization which has been finally ordered to register as a Communist organization and its denial to such an organization of tax-exemption under the Internal Revenue Code are reasonable and valid withdrawals by Congress of its legislative grace for proper reasons of policy.

(iii) The Act makes it unlawful for officers and employees of the United States and of defense facilities to contribute funds or services to organizations which have been finally ordered to register. Assuming that the effect of this prohibition on petitioner is not so remote, despite the indirectness of its impact, as to deprive it of standing to challenge it, it is a reasonable

and valid measure in relation to the evil at which the Act is aimed. If Congress can validly forbid employees of the United States to engage in partisan politics (*United Public Workers v. Mitchell*, 330 U. S. 75), and if the Government has the power to safeguard itself by appropriate security and loyalty investigations of its employees, Congress can validly forbid them to contribute to the welfare of an organization having as a primary objective the destruction of their employer at the earliest feasible opportunity and "by any available means, including force if necessary" (§ 2 (6)).

Similarly, if Congress can validly provide that members of a Communist-action organization shall be ineligible for defense-facility employment (see *infra*, p. 29), it can also forbid the employees of such facilities to support such an organization with money contributions.

(b) *Sanctions applicable to individual members of organizations ordered to register.*—(i)

The members of an organization finally ordered to register are barred from government and defense-facility employment, and from holding office in or employment with any labor organization or as employer-representatives in proceedings under the National Labor Relations Act.

The reasonableness and validity of the prohibition against government employment is clear.

The prohibition applies only to those members who continue to remain such with knowledge or notice that the organization to which they belong either has voluntarily registered under the Act or has been finally ordered to do so. The prohibition against defense-facility employment is on a par with that relating to government employment. The manifest purpose of the prohibition is to guard against sabotage and espionage in establishments vital to the national defense. Congress is not limited, in guarding the nation against these dangers, to exacting criminal penalties after they occur. It can adopt reasonable measures to prevent their occurring. We must assume that the Secretary of Defense, under the power granted him by § 5 (b), will designate as "defense facilities" establishments that are vital to the national security. The Secretary's discretion is not "unfettered"; the rule of reason would apply here as elsewhere to supply a remedy if the authority were abused.

The prohibition against holding office in or employment by labor organizations is a logical corollary of *American Communications Assn. v. Douds*, 339 U. S. 382, where the Court sustained the validity of the non-Communist affidavit provision of the amended National Labor Relations Act. If a union officer who cannot subscribe to a non-Communist affidavit can be forced out of his position of leadership in the union by the indirect

method of depriving his union of rights it would otherwise enjoy before the Labor Board, there can be no infirmity in directly prohibiting him from being on a labor union staff as an officer or employee, so long as he retains his Communist ties. The prohibition against employer-representation is on the same footing, for management representatives, from their places on the other side of the bargaining table, can use their positions for political ends to the same (if not to a greater) extent than union officials.

(ii) Equally valid is the prohibition against the use of passports by members of organizations which have been finally ordered to register. The Government may decline to confer its diplomatic protection upon members of an organization found to be dedicated to its overthrow by force. The passport sanction is also valid insofar as it prevents travel abroad by members of such an organization. The unity and cohesive force of the world Communist movement are promoted through personal contacts of its members both here and abroad. Congress has the power to seek to prevent such contacts in the manner encompassed by this provision.

(iii) Alien members of Communist-action organizations which by a final order have been directed to register are excludable and deportable from the United States, and are ineligible for naturalized citizenship. Petitioner expressly con-

cedes the validity of the exclusion and deportation sanctions. And there can be no doubt of the constitutionality of the naturalization sanction in view of the plenary power of Congress to impose conditions upon the conferring of citizenship by naturalization. The Act also provides that membership (within five years after naturalization) in a Communist-action organization shall, with respect to persons who obtain naturalization in the future, constitute a rebuttable presumption in denaturalization proceedings of lack of attachment to the principles of the Constitution at the time of naturalization. Since there is no question of retroactivity, or of the Government's revoking a grant of citizenship on grounds which the naturalized person could have had no reason to anticipate when he received it, the provision is likewise valid.

2. The member-sanctions do not deprive petitioner's members of due process, in that they do not rest on innocent and unknowing memberships and associations of the past. They apply only to members who continue their membership after an organization registers, or is finally ordered to register. *Wieman v. Updegraff*, 344 U. S. 183, is therefore inapplicable. Nor is there merit in petitioner's contention that, after an organization has registered as a Communist-action group, thereby admitting its character as defined in § 3 (3), or after it has been formally found to be such

an organization by a Board finding which has been judicially reviewed and sustained, each member must be afforded an opportunity personally to rebut the characterization, before any member-sanction can apply to him on account of his continued membership.

3. The sanction provisions do not make of the Act a bill of attainder. For a legislative act to constitute a bill of attainder, it is necessary that there be *punishment* and that the conduct punished be *past* conduct. *American Communications Assn. v. Douds*, 339 U. S. 382. The latter characteristic, regardless of whether the sanctions be deemed of a penal nature or not, is not present in the Act at bar. The "members" on whom the sanctions are imposed are not past or former members of the organization, but *current* members. *Bona fide* termination of membership by any person who is a member up to the time of registration or the time when an order to register becomes final precludes the sanctions' taking effect as to him.

III

The court below correctly sustained the Board's factual findings that petitioner is a Communist-action organization as defined in the Act.

A. There is no occasion for a second judicial review of the Board's factual finding that petitioner is a Communist-action organization. A unanimous Board found, on the basis of the

"overwhelming weight of the evidence", that petitioner is a Communist-action organization. It presented the grounds of this finding, and the subsidiary findings on which it rests, in an exhaustive report covering 133 printed pages. The court below, in discharge of its statutory obligation, after a painstaking review of the entire record, determined that the Board's finding was "supported by the preponderance of the evidence", and devoted more than a third of its 76-page opinion to a discussion and analysis of the evidence on both sides. In these circumstances, there is no occasion for this Court to subject the lengthy transcript to a second judicial review for the purpose of reappraising and re-evaluating the evidence. It need do no more than satisfy itself that the court below made a fair assessment of the record on the issue of sufficiency of the evidence. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498; *National Labor Relations Board v. American Insurance Co.*, 343 U. S. 395. That the court below did so is evident from its opinion.

B. Petitioner makes no attempt to assay the significance of any of the proof it attacks from the standpoint of the sufficiency of the evidence as a whole. Its attack is concentrated on minutiae of the evidence, frequently lifted out of context. This fragmentary approach overlooks the fact that all relevant facts are cumulative

in delineating a completed whole, and that an unmistakable picture can emerge from numerous fragments having little individual significance. Viewed from the standpoint of the record as a whole, petitioner's criticisms are but pin-pricks at the evidence, often relating to matters having obviously minor bearing on the ultimate issue.

1. The Board and the court below correctly construed and applied the evidentiary considerations enumerated in § 13 (e) of the Act. The Board's finding, *inter alia*, that Marxism-Leninism, as understood, used, and followed by petitioner, consists of a body of doctrine, policies, strategies, and tactics intended to bring about the end of capitalism and to substitute for it a dictatorship of the proletariat; and that it has been promulgated and issued by the Soviet Union as "the overall philosophy, authoritative rules, directives and instructions governing the world Communist movement", fully met the requirements of the "directives and policies" factor.

As for the "non-deviation" factor, the point is not that petitioner's views on every issue were hostile to the interests of the United States. The point is rather that the fact that a domestic organization, throughout its 30 years' history, has faithfully and without deviation mirrored the views of a foreign power on every significant aspect of world politics is surely evidence, to be weighed in the balance with all the other evi-

dence, that the foreign power controls the domestic organization and dictates its policies.

The contention that the Board and the court below misconstrued and misapplied the "discipline" factor of § 13 (e) (6) is in reality nothing more than an attack on the sufficiency of the evidence supporting the Board's finding on this point. It illustrates petitioner's mistaken insistence, met with throughout its discussion of the evidence, that the evidence under each of the § 13 (e) categories be considered *in vacuo*, unconnected with and unilluminated by any of the other evidence of record.

The argument that the Board misapplied the "allegiance" factor of § 13 (e) (8) is based on petitioner's mistaken assumption that the Board's finding that petitioner advocates the violent overthrow of the United States Government was based primarily on the Marxist-Leninist writings considered by this Court in *Schneiderman v. United States*, 320 U. S. 118. The Board's force-and-violence finding was based upon the testimony of former members of petitioner, as well as upon authoritative writings not in evidence in the *Schneiderman* case.

2. The Board's finding that petitioner is a Communist-action organization is based upon proof as to its current practices and activities as illuminated by its past history. The Board did not, as petitioner contends, rest its decision upon any "vague presumption of continuance". Peti-

tioner's own witnesses testified that petitioner was the same sort of organization at the time of their testifying as it had always been. Petitioner's whole position in this case has been that it has never been—or at least that it has not been since 1940—an organization of the type the Act defines. The Government's evidence overwhelmingly established the contrary—that petitioner was and is such an organization.

3. The Board's conclusion that there exists a world Communist movement having the characteristics described in § 2 of the Act, while not essential to the validity of its order, was in any event supported by the preponderance of the evidence, as the court below found.

C. Petitioner's intemperate attack on the Attorney General's witnesses as "discredited" and its charge that the Board's findings are based on "misrepresentation of the evidence" are insubstantial and are based in many instances on distortions of the record. The use of informers as witnesses involves issues, not of law, but of credibility, the resolution of which is for the triers of the facts. The record shows that all of the Attorney General's witnesses were subjected to extensive cross-examination on matters going both to the substance of their testimony and to issues of credibility, and the Report of the Board makes it clear that it carefully weighed

petitioner's attacks on the character of certain of the witnesses.

D. The action of the court below in modifying two of the subsidiary findings of the Board did not require that it remand the case to the Board for redetermination. The court found that the Board's ultimate and decisive finding—that petitioner is a Communist-action organization as defined in the Act—was supported by the preponderance of the evidence. Under the circumstances, remand would have served no useful purpose. It therefore correctly affirmed the Board's order. *National Labor Relations Board v. Newport News Co.*, 308 U. S. 241.

IV

Petitioner was not denied a fair hearing before the Board.

A. There is no evidence that the Board, whose members served originally under recess appointments, was subjected to "extra-legal pressures" on the part of the Senate Judiciary Committee or its chairman. Petitioner's argument that "for many months during the pendency of the administrative proceeding, the tenure of the Board members was subject to the pleasure of the Senate Judiciary Committee" is in essence an indictment of all recess appointments as such. Petitioner's buttressing argument, that influence was in fact exerted on the Board members, finds no support in the record, but rests on pure specu-

lation stemming from the fact that certain of the Attorney General's witnesses discussed the conduct of Board members in conversations with an old friend of theirs, a former member of the Communist Party, who was an employee of a subcommittee of the Senate Judiciary Committee.

B. Petitioner's motions to disqualify panel members McHale and Brown for alleged personal bias and prejudice were properly denied.

1. The comments of panel member McHale in the speech which she made during the progress of the hearings, viewed in their context, did not indicate a belief on her part, as petitioner contends, that the hearings were a mere formality.

2. The remarks of panel member Brown which petitioner claims showed bias on his part were made *after* he and Dr. McHale had made their findings and recommendations in the case. Mr. Brown's public repetition of what he had already made a matter of record—that on the evidence he had heard he believed petitioner to be a Communist-action organization as defined in the Act—showed no bias on his part.

V

A motion to the Court of Appeals under § 14 (a) for leave to adduce additional evidence before the Board is addressed to the sound judicial discretion of the court. Cf. *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9. In this case an analysis of the

evidence, particularly as shown in the Board's memorandum in opposition to petitioner's motion, indicates that, even if the testimony of the three government witnesses in question were completely ignored, there would have been no reasonable possibility that the Board's ultimate and decisive finding—that petitioner is a Communist-action organization as defined in the Act—would have been different.

VI

A. The recess appointments of Board members Brown, McHale, and Coddaira during the adjournment of the Second Session of the 81st Congress from September 23 to November 27, 1950, were valid.

1. The appointments filled "vacancies" on the Board even though the offices filled were newly-created positions which had had no prior occupants. The argument that the only vacancies which may be filled by recess appointments are vacancies arising from the death, resignation, or removal of prior occupants would frustrate to an important degree the very purpose of the recess appointment clause, which is to enable the business of government to be carried on through temporary appointments during periods when the Senate is not available to act on nominations to office. This has been the prevailing understanding.

2. The fact that the vacancies arose simultaneously with the passage of the Act on September 23, 1950, while the Senate was still in session, did not preclude their being filled by recess appointments during the recess, or period of adjournment, which commenced later on that same day. The true meaning of the recess appointment clause—the one which alone comports with its evident sense and spirit, and which has the support of executive interpretations commencing at an early date in the nation's history, in addition to sound judicial support—is that the President may make recess appointments to fill vacancies which *happen to exist* during a Senatorial recess even though they may have come into existence while the Senate was in session.

3. The appointments were made during "the recess" of the Senate. IntraseSSIONAL adjournments to a day certain, if of substantial duration, as well as *sine die* adjournments between sessions, are recesses within the meaning of the constitutional clause. The decisive consideration is whether the Senate in a practical sense is unavailable to receive nominations to office, so as to necessitate the granting of temporary commissions to fill vacancies in order that the business of government may be carried on. The Senate was absent and unavailable in this practical sense during the period of adjournment from September 23 to November 27, 1950.

B. The recess appointments did not expire on January 2, 1951, with the expiration of the Second Session of the 81st Congress, thereby leaving a seven-month hiatus in the tenure of the Board members, *i. e.*, between that date and August 9, 1951, when the members' regularly submitted nominations were duly confirmed. Under the terms of the recess appointment clause, recess appointments expire at "the end" of the "next session" of the Senate following "the recess" in which they were made. In this case, the "next session" was the First Session of the 82d Congress, which began on January 3, 1951, and did not end until October 20, 1951. Senate confirmation of the members' nominations on August 9, 1951, thus occurred during that session, while the recess appointments were still in effect. There was consequently no gap in the members' tenure. Petitioner's contention that the recess appointments expired on January 2, 1951, with the close of the Second Session of the 81st Congress, involves the untenable assumption that the adjournment of Congress from September 23 to November 27, 1950, split that "Session" into two "sessions." That such adjournments to a day certain do not have this effect is clear from Article I, § 5, clause 4 of the Constitution, which provides that "Neither House, *during the Session of Congress*, shall, without the Consent of the other, adjourn for more than three days * * * [emphasis added]."

ARGUMENT

Petitioner and the *amici curiae* level a broad-scale attack against almost every provision and facet of the Subversive Activities Control Act, as if the Court were called upon in this one ruling to pass upon the whole Act and its entire application. But the truth is, of course, that the Act is multi-faceted and only some of its aspects are now ripe for adjudication. Three types of organizations—"Communist-action", "Communist-front", and "Communist-infiltrated"—are dealt with in the Act. As to these organizations, there are three general classes of provisions—hearing and registration requirements, non-criminal sanctions, and criminal penalties; there are also comparable classes of provisions as to certain categories of individuals. In this case at this time, we have only one organization and only one of the three types—the Communist Party of the United States, found to be a Communist-action organization; no other class of organization and no individuals at all are before the Court. Moreover, we are dealing with the Communist Party only at the stage when it is availing itself of its statutory right to contest in the courts the Board's finding that it is a Communist-action organization and the Board's order that it register as such.

These facts mold the frame in which the Court will view the case and in which we must present

it. But before focussing directly on the various levels of controversy, we think that it will be helpful to sketch the historical background of the Act, and also to give a somewhat detailed analysis of the Act's provisions (although only part of these provisions are directly pertinent to this case).

I

INTRODUCTION: THE BACKGROUND AND PROVISIONS OF THE SUBVERSIVE ACTIVITIES CONTROL ACT

A. THE HISTORICAL BACKGROUND OF THE ACT

We give a brief review of the Act's historical setting in the hope that it will assist the Court in its task of weighing the merits of petitioner's arguments. Just as an examination of the problem or evil which evoked the passage of legislation is a sound guide to its purpose and meaning (*Holy Trinity Church v. United States*, 143 U. S. 457, 465; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 489-493), so too a fair appreciation of the nature of the problem which led to the enactment of a statute is indispensable to proper evaluation of the soundness of challenges to its constitutionality. Cf. *American Communications Assn. v. Douds*, 339 U. S. 382, 388-389; *Dennis v. United States*, 341 U. S. 494, 562-566 (Mr. Justice Jackson, concurring). Consideration of the problems which called the legislation here involved into being will tend to show, we believe, the reasonableness of the basic scheme of the Act, par-

ticularly as applied to the petitioner, and thus to refute the contention that it arbitrarily invades basic constitutional liberties. Rarely has there been a more intense study of methods of dealing with a particular evil than that which preceded and produced the Subversive Activities Control Act of 1950.⁵

Following World War I, there developed the powerful totalitarian political movements of Communism, National Socialism, and Fascism in Russia, Germany, and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies* (1938), 38 Col. L. Rev. 591-622, 725-774. By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philoso-

⁵ There is a more detailed discussion of much of this material in the Government's brief in this Court, pp. 174 *et seq.*, in *Dennis v. United States*, Oct. Term 1950, No. 336.

phies, but of external aggression aided by local Trojan-Horse groups serving the aggressive aims of their foreign principals.

As early as 1910, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced in various cities of the United States. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st sess. (1953), pp. 216-217. In 1934, the investigation was extended to Nazi propaganda activities. *Id.*, pp. 217-218. During the years 1930-1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country" (Hearings before a Special Committee to Investigate Communist Activities in the United States, H. R., 71st Cong., 2d sess., Part I, vol. 4, p. 384).

Also significant were the 1939 hearings before the House Committee on Un-American Activities, in which the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union (Hearings before a

Special Committee on Un-American Activities, H. R., 76th Cong., 1st sess., vol. 7, *passim*). Congress had before it the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International*, adopted at the Second World Congress of the Communist International in 1920 (*id.*, vol. 7, pp. 4668-4671).⁶ Among the "conditions" which a party aspiring to join the International was required to accept were: Willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition 4); renunciation of "social patriotism," and systematic demonstration to the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6); recognition of the necessity of "complete and absolute rupture with reformism and the policy of the 'centrists'" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to "re-

⁶ These *Theses, Statutes, and Conditions of Admission* were in evidence in the present proceeding (A. G. Ex. No. 8, R. 1318-1332). They are also set forth in *Blueprint for World Conquest as Outlined by the Communist International* (Human Events, 1946), pp. 33-72.

move all unreliable elements" from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).⁷

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International (Hearings, etc., *supra*, vol. 7, pp. 4308-4311, 4667-4668).

⁷ *Blueprint for World Conquest as Outlined by the Communist International* (Human Events, 1946), pp. 66-72; Hearings, etc., *supra*, vol. 7, pp. 4669-4671.

For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party with that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinoviev (*id.*, p. 4432),* and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.*, p. 4671)—

* * * Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering upon a course leading toward an attempt to split the party, a course in violation of the 21 conditions and the statutes of the Comintern: * * * [Emphasis added.]

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years (see *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st sess., pp. 216-219), from which it could be concluded that both the Communist International and the Com-

* The full text of this speech is set forth in the Appendix to the Hearings, Part I, pp. 876-882.

munist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See also H. Rep. No. 153, 74th Cong., 1st sess. (1935), p. 21.

Congress first endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—i. e., §§ 2, 3, and 5 (now consolidated in 18 U. S. C. § 2385)—it was made a criminal offense to advocate the overthrow of the Government by force and violence or to conspire so to advocate.^{8a} The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Regis-

^{8a} The constitutionality of this provision, as applied to a conspiracy charge against eleven national officers of petitioner for the period from April 1, 1945, to July 20, 1948, was upheld in *Dennis v. United States*, 341 U. S. 494. See also *Frankfeld v. United States*, 198 F. 2d 679² (C. A. 4), certiorari denied, 344 U. S. 922 (sustaining the conviction of other functionaries of the Party); *United States v. Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909 (thirteen Party leaders); *Yates v. United States*, — F. 2d — (C. A. 9), decided March 17, 1955, pending on writs of certiorari, Nos. 308-310, this Term (fourteen Party leaders); *United States v. Mesarosh*, 223 F. 2d 449 (C. A. 3), pending on petition for certiorari, No. 295 Misc., this Term (five Party leaders).

tration Act, c. 327, 52 Stat. 631, 22 U. S. C. §§ 611-621, requiring the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated as follows (H. Rep. No. 1381, 75th Cong., 1st sess., pp. 1-2; S. Rep. No. 1783, 75th Cong., 3d sess., pp. 1-2):

Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.

* * * * *

This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing

American public opinion on a political question.

* * * * *

We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.

Various difficulties in the enforcement of the Foreign Agents Registration Act (see Report of the Institute of Living Law, 87 Cong. Rec., Appendix, pp. A4417-4419 (1941); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107) resulted in its amendment by the Act of April 29, 1942, c. 263, 56 Stat. 258, which strengthened the provisions and transferred the administration of the Act to the Attorney General. The Reports of the Attorney General to Congress on the Administration of the Foreign Agents Registration Act detail the operation of that statute.

The purpose of Congress to expose the foreign origin of various propaganda activities was, however, not fully achieved, partly because of an increased tendency to bring information services under the aegis of diplomatic immunity (see Report of the Attorney General on the Admin-

istration of the Foreign Agents Registration Act, 1945-1949, p. 8; 1950 Report, pp. 5-6; 1951 Report, pp. 6-7), and partly because of controversy as to the scope of the "agency" required under the statute. See *Viereck v. United States*, 318 U. S. 236, 242; *United States v. German American Vocational League*, 153 F. 2d 860, 864 (C. A. 3), certiorari denied, 328 U. S. 833; *United States v. Peace Information Center*, 97 F. Supp. 255, 258-259 (D. D. C.). The necessity of proving the fact of agency within the context of a criminal trial made difficult the enforcement of the Act against organizations which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control.

On October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U. S. C. § 2386), requiring the registration, *inter alia*, of any organization "subject to foreign control which engages in political activity." The phrase "subject to foreign control" was defined in § 1 of the Act as follows:

(e) An organization shall be deemed "subject to foreign control" if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political

party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization.

The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with respect to the purposes of the bill (H. Rep. No. 2582, 76th Cong., 3d. sess., p. 1):

Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.

* * * * *

The principle upon which this bill is based is that there is no place in a democracy for undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See ⁸Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107, 122-133. Since religious, charitable, scientific, literary, and educational organizations were excluded from the Act's coverage, propaganda organizations could seek to avoid registration by styling themselves under one of the excluded categories. There was no express provision making the officers guilty if a corporation or association failed to register. In the case of a corporation or unincorporated association without funds for the payment of fines, there were no appropriate sanctions to enforce compliance. While it was originally anticipated that both the Communist Party and the German-American Bund would have to register under the Act (H. Rep. No. 2582, 76th Cong., 3d sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorce. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *inter alia* (C. P. Ex. 13, p. 15):

That the Communist Party of the U. S. A., in Convention assembled, does hereby cancel and dissolve its organiza-

tional affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representatives as H. R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *

This disaffiliation and its stated purpose are not disputed by petitioner (Br. 202). Its spurious character was demonstrated by the testimony in this case. See Report of the Board at R. 14 [1828-1829].

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations believed (with reason) to be subversive but which veiled their true ends behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating*

Totalitarian Propaganda: The Method of Suppression (1942), 37 Ill. [Northwestern Univ.] L. Rev. 193, 204-205; Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L. Q. 182, 201; Moore, *The Communist Party of the USA: An Analysis of a Social Movement* (1945), 39 Am. Pol. Sci. Rev. 31, 36-37.

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.⁹ Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada, led to the establishment of a Royal Commission in Canada to investigate espionage activities being conducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Com-

⁹ Some details of this history are set forth in the Government's brief, at pp. 199-203, in *Dennis v. United States*, No. 336, Oct. Term, 1950.

mission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N. K. V. D. (Soviet secret police) in direct communication with Moscow (*id.*, pp. 11-13). It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent (*id.*, pp. 37-41). The Report quoted a statement by Gouzenko that (*id.*, p. 37)—

The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony" (*ibid.*).

The Commission found that the main recruiting ground for espionage agents was the illegally constituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents (*id.*, pp. 44-48, 69-83). Often a particular Communist agent would be selected for Colonel Zabolotin's group on orders directly from Moscow (*id.*, pp. 44-48). It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments of the Canadian government (*id.*, pp. 48-49, 97). Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy (*id.*, pp. 59-68).¹⁰ ♥

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character against the United Kingdom and the

¹⁰ Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rose v. The King*, 3 [1947] D. L. R. 618, 88 Can. Cr. Cas. 114; *Boyer v. The King*, 94 Can. Cr. Cas. 195 (1948); *Rex v. Mazerall*, 4 [1946] D. L. R. 791, [1946] Ont. Rep. 762; *Rex v. Lunan*, 3 [1947] D. L. R. 710, [1947] Ont. Rep. 201; *Rex v. Harris*, [1947] Ont. Rep. 461; *Rex v. Smith*, [1947] Ont. Rep. 378; *Rex v. Gerson*, [1947] Ont. Rep. 715.

United States. See the New York Times, February 11, 1950, p. 2.¹¹

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States*, H. Rep. No. 1229, 82d Cong., 2d sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work (*id.*, pp. 5-7, 15). Testimony by former Communist agents showed that Communist espionage groups had successfully infiltrated certain strategic areas of the Government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments*. (Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st sess., dated July 30, 1953); see also *United States v. Hiss*, 185 F. 2d 822, 829 (C. A. 2), certiorari denied, 340 U. S. 948. Espionage

¹¹ Since the passage of the Subversive Activities Control Act, in September 1950, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15), as well as with the case of McLean and Burgess, the British diplomats, who have apparently fled to the Soviet Union.

agents were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years*, etc. (*op. cit. supra*), pp. 31, 35. Later, after the passage of the Subversive Activities Control Act, atomic and radar information was proved to have been passed to the Soviet Union by an international group. See *United States v. Rosenberg*, 195 F. 2d 583, 589, 598-601 (C. A. 2), certiorari denied, 345 U. S. 965.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950, 183 F. 2d 201 (C. A. 2), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit, *Dennis v. United States*, 341 U. S. 494 (without finding it necessary to review the sufficiency of the evidence).

Armed warfare began in Korea in June 1950.

Thu., Congress had reason to believe, in September 1950, that the dissolution of the Communist

International in 1943 had been merely a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United States.¹² This was the problem with which Congress undertook to deal in the Subversive Activities Control Act of 1950.

B. THE IMMEDIATE EVOLUTION OF THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. Efforts were made to remove objectionable features from early drafts and to define with precision the terms employed without leaving the remedial legislation vulnerable to the kind of calculated avoidance that had been the prime weakness of previous registration statutes.

The so-called "Mundt-Nixon" bill (H. R. 5852, 80th Cong., 2d sess.) was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948 (94 Cong. Rec. 2893). As amended and reported out, § 8 of the bill provided for registration with the Attorney General by "Communist political organizations" and "Communist-front organizations." The Attorney

¹² See, in addition to the materials referred to in the text, *The Strategy and Tactics of World Communism* (Report of the House Foreign Affairs Committee's Subcommittee No. 3 on National and International Movements); H. Doc. No. 619, 80th Cong., 2d sess. (1948), pp. 3-4.

General was authorized under § 13, either on his own initiative or at the request of either House of Congress, to make an investigation and conduct hearings to ascertain whether an organization was required to register.

In its report on the bill, the Committee on Un-American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties" (H. Rep. No. 1844, 80th Cong., 2d sess., p. 5). It was also stated that, while the Alien Registration Act of 1940—*i. e.*, the Smith Act—made it a crime to advocate the overthrow of the Government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence" (*ibid.*). The report also indicated that ten years' investigation by the Committee had established (*id.*, p. 2)—

- (1) That the Communist movement in the United States is foreign-controlled;
- (2) that its ultimate objective with respect to the United States is to overthrow our

free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Senate Judiciary Committee, to which the House bill was referred, sought the advice of several prominent lawyers and the then Attorney General as to the constitutionality of the bill (see 94 Cong. Rec. 9028). The legal memoranda received in response to this request are set out at pp. 415-428 of Hearings before the Committee on the Judiciary, Senate, 80th Cong., 2d sess., on H. R. 5852; see also *id.*, pp. 428-488.¹³ The principal objection of those who thought the bill had constitutional defects was that the bill used such terms as "Communist political organization" and "Communist-front organization" without adequately defining those terms, and furnished the Attorney General with no precise legislative

¹³ See also the analysis of the bill in Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948-49), 34 Corn. L. Q. 182-219, 352-375.

guide in determining whether an organization was required to register.

A new version of the bill was prepared (see 94 Cong. Rec. 9028, 9029-9032). It more precisely defined in its § 3 the terms "Communist political organization" and "Communist-front organization," and set forth in § 7 the duty of such organizations to register with the Attorney General and to file annual reports. In place of the provision for an administrative determination by the Attorney General, the revamped bill (§§ 12, 13) provided for a Subversive Activities Board, similar to that finally established in the Act, which was to make the determination as to whether a given organization was required to register, with further provision for judicial review of its determinations.

The redrafted bill—known as the "Mundt-Ferguson-Johnston" bill—was introduced in the First Session of the 81st Congress as S. 2311.¹⁴ The opinions of various prominent attorneys were again solicited and the consensus appeared to be that in respects here relevant the bill met the constitutional objections theretofore raised and at the same time avoided the weaknesses of

¹⁴ S. 2311 evolved after extensive hearings before a subcommittee of the Senate Judiciary Committee from S. 1194 and S. 1196, which were originally introduced in the 81st Congress.

prior legislation (S. Rep. No. 1358, 81st Cong., 2d sess., pp. 7, 16-17).

The Internal Security Act, of which the Subversive Activities Control Act is a constituent part (Title I), was passed on September 23, 1950, over the President's veto. Both the House and Senate committee reports reemphasized the pressing need for bringing Communist organizations out in the open through the medium of registration requirements (H. Rep. No. 2980, 81st Cong., 2d sess., on H. R. 9490; S. Rep. No. 2369, 81st Cong., 2d sess., on S. 4037; S. Rep. No. 1358, 81st Cong., 2d sess., on S. 2311). The House committee report reiterated the fact that prior legislation directed to this end had been ineffectual against the Communist Party itself, and cited the fact that 30 of the 70 major countries of the world had outlawed the Communist Party (H. Rep. No. 2980, 81st Cong., 2d sess., p. 2). The report further noted that the committee had rejected proposals to outlaw the Communist Party or to make membership therein illegal *per se*, and emphasized that the "Communist organization of the United States" was not made guilty of any offense by reason of the enactment of the Act (*id.*, p. 5).

C. THE STRUCTURE AND PROVISIONS OF THE ACT

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, c. 1024,

64 Stat. 987, 50 U. S. C. §§ 781ff. It has been twice¹⁵ amended—once, in a relatively minor detail (see *infra*, p. 71), by the Act of July 29, 1954, c. 646, 68 Stat. 586, and again, in a more substantial manner, by the Communist Control Act of [August 24] 1954, c. 886, §§ 6–11, 68 Stat. 775, 777–780. In view of the length of the Act and the complex interlocking of its numerous sections and subsections, a summarization of its principal provisions may be helpful to the Court. Rather than a mere section-by-section summary, the effort will be to present an over-all view showing the structure of the Act, with emphasis on the essentials of the registration scheme and the nature of the so-called “sanctions”, or legal consequences which attach to an organization’s act of registering (or being ordered to register), both as they affect the organization itself, considered as an entity, and as they affect individual members of the organization and others.

1. The congressional findings as to the necessity for the legislation

Section 2 sets forth in fifteen numbered paragraphs certain findings—based on “evidence adduced before various committees of the Senate

¹⁵ Exclusive of a 1952 amendment increasing the salaries of Board members from \$12,500 to \$15,000 per annum (Act of July 12, 1952, c. 697, 66 Stat. 590), and a 1955 amendment relating to tenure of Board members (Subversive Activities Control Board Tenure Act, Pub. Law 254, 84th Cong., 1st sess., August 5, 1955, 69 Stat. 539).

and House of Representatives"—which convinced Congress of the necessity for the legislation. Congress found, for example, that "[t]here exists a world Communist movement" consisting of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (§ 2 (1)). The "direction and control" of this movement was found to be "vested in and exercised by the Communist dictatorship of a foreign country," not named in the Act (§ 2 (4)). This foreign Communist dictatorship; it was further found, establishes "action organizations" in various countries, these organizations being "sections of a world-wide Communist organization" and controlled by the foreign dictatorship (§ 2 (5)). These "Communist-action organizations" seek to bring about "the overthrow of existing governments by any available means, including force if necessary" and to set up in their stead local Communist dictatorships subservient to the parent dictatorship (§ 2 (6)). These Communist organizations "are organized on a secret, conspiratorial basis" and operate to a substantial extent through organizations known as "Communist fronts," which are maintained

and used so as to conceal their true character and membership (§ 2 (7)). Finally, Congress found (§ 2 (15))—

The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the ex-

istence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

2. *“Communist-action” and “Communist-front” organizations*

“Communist-action organization.”—The Act defines a “Communist-action organization” as “any organization in the United States” other than one diplomatically accredited which “is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2” and which “operates primarily to advance the objectives” of that movement “as referred to in section 2” (§ 3 (3)).

“Communist-front organization.”—A “Communist-front organization” is defined as “any organization in the United States” which is “substantially directed, dominated, or controlled by a Communist-action organization” and “is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement” (§ 3 (4)).

3. *The registration scheme*

The heart of the Act—the organizational registration requirement—is contained in § 7.

The duty of Communist-action and Communist-front organizations to register with the Attorney

General.—Each Communist-action organization (§ 7 (a)) and each Communist-front organization (§ 7 (b)) is required to “register with the Attorney General on a form prescribed by him by regulations” as the one or the other type of organization. Registration is to be effected within 30 days after enactment of the Act (§ 7 (c) (1)), or, in the case of an organization which becomes registerable after the Act’s passage, within 30 days after becoming registerable (§ 7 (c) (2)). In the case of an organization which does not voluntarily register and which is subsequently ordered to register by the Subversive Activities Control Board, registration ~~must be effected~~ within 30 days after the Board’s order becomes final¹⁶ (§ 7 (c) (3)).

The registration statement.—The registration process includes the submission of a registration statement, to be prepared in accordance with regulations, containing certain specified information (§ 7 (d)). The information is to include (1) the name and address of the organization, (2) the name, address, title, and duties of each officer of the organization, including each person who has been an officer at any time during the preceding year, (3) an accounting of all funds received

¹⁶ The process leading to an order by the Board to register is provided for in § 13 (see *infra*, pp. 73–75). The conditions under which a Board order becomes final are set forth in § 14 (b) (see *infra*, p. 79).

and spent by the organization during the preceding year, including the sources of the funds and the purposes of the expenditures, (4) (applicable to action organizations only) the name and address of each member of the organization, including each person who has been a member at any time during the preceding year, (5) any aliases that may ever have been used by any officer or member required to be listed, and (6)¹⁷ a list of all printing presses and other mechanical devices used in printing in the possession or control of the organization, its officers, or members.

Annual reports.—Annual reports are required to be submitted to keep the initial registration statement up to date (§ 7 (e)).

Records required to be kept.—Accurate financial records are required to be kept by all registered organizations (§ 7 (f) (1)). In addition, action organizations are required to keep accurate membership lists (§ 7 (f) (2)).

Remedies open to persons claiming to be wrongly listed.—Section 7 (g) provides certain remedies for persons who are listed by reporting organizations as being officers or members and who deny they are such. The Attorney General is required to notify all individuals whom reporting organizations list as officers or members that they have been so listed. Any listed individual who denies that he is an officer or member may

¹⁷ Added by the Act of July 29, 1954, c. 646, 68 Stat. 586.

request the Attorney General to strike his name from the statement. In such event, the Attorney General is required to investigate the matter, and if he is satisfied that the denial is correct, he is to strike the individual's name. If he is not satisfied that the denial is correct and declines to strike the name, or if he fails to strike it within five months after receiving the request, the individual may petition the Board for relief pursuant to § 13 (b) (see *infra*, p. 78).

Publication to constitute notice.—Upon the registration of an organization, the Attorney General is required to publish in the Federal Register the fact that the organization has registered as a Communist-action or Communist-front organization as the case may be (§ 9 (d)). Such publication, it is provided, “shall constitute notice to all members of such organization that such organization has so registered” (*ibid.*).

Keeping of registers.—The Attorney General is required to keep registers of all organizations which register, consisting of the names and addresses of the organizations and their registration statements and annual reports (§ 9 (a)). The registers are to be open to public inspection, except that the name of any person listed by an organization as being an officer or member who denies his status as such may not be made public pending determination by the Attorney General of the correctness of the listing (§ 9 (b)).

4. Proceedings before the Board leading to orders requiring organizations to register

Section 13 of the Act provides for quasi-judicial proceedings before the Subversive Activities Control Board leading to orders requiring, or refusing to require, organizations claimed by the Attorney General to be action or front groups to register with him as such. The Board itself is established and its general powers and functions defined in § 12.

The petition by the Attorney General.—Whenever the Attorney General has reason to believe that any organization which has not registered under § 7 (a) as an action organization or under § 7 (b) as a front organization “is in fact an organization of a kind required to be registered under such subsection,” he is required to file with the Board and serve upon the organization a petition for an order requiring the organization to register (§ 13 (a)).

Hearings before the Board.—Upon the filing of such a petition, the Board (or any member or a designated examiner) holds a hearing to inquire into the facts regarding the organization's registerability (§ 13 (c)). The administration of oaths and the issuance of subpoenas are provided for (*ibid.*). Hearings are public, and each party is entitled to present its case with the assistance of counsel, to offer oral or documentary evidence, and to cross-examine opposing witnesses (§ 13 (d)).

Types of evidence required to be considered.—Section 13 (e) sets forth in eight numbered paragraphs certain types of evidence which the Board is required to consider in determining whether an organization is a Communist-action organization under § 3 (3). For example, the Board is to take into consideration—

(1) the extent to which its [the organization's] policies are carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government, or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 * * *.

Similarly, § 13 (f) sets forth evidential factors required to be taken into consideration in determining whether an organization is a front group under § 3 (4).

Reports and orders.—If the Board determines that the organization is a Communist-action or Communist-front organization, it must make a report stating its findings of fact and issue an order requiring the organization to register (§ 13 (g) (1)). If it determines that the organization is not such a group, it so reports and issues an order denying the Attorney General's petition (§ 13 (h) (1)).

Publication to constitute notice.—When an order of the Board requiring registration of a

Communist-action organization becomes final (see *infra*, p. 79), that fact must be published in the Federal Register, and such publication is declared to "constitute notice to all members of such organization that such order has become final" (§ 13 (k)).

5. The duty of individuals to register under certain circumstances.

The Act also imposes upon individuals a duty to register under certain circumstances.

(a) Officers required to effect an organization's registration

If a Communist-action or Communist-front organization should fail to register or to file a registration statement or annual report as required by § 7, it is the duty of the executive officer and of the secretary of the organization (or the individuals performing the usual duties of such officers), and of such other officers as the Attorney General may by regulations prescribe,¹⁸ to reg-

¹⁸ Pursuant to the authority thus vested in him, the Attorney General has designated the following additional officers as sharing with those named in the Act the responsibility of effecting the registration of an organization which is required to register but fails to do so: (a) the president, chairman, or other person who is chief officer; (b) the vice-president, vice-chairman, or person performing the functions of either; (c) the treasurer; and (d) members of the governing board, council, or body (28 C. F. R. § 11.205).

ister for the organization or to file the registration statement or annual report, as the case may be (§ 7 (h)).

(b) Personal registration by members of Communist-action organizations

Conditions under which required.—The Act specifies two conditions under which members of a Communist-action organization are required to register personally with the Attorney General. First, if there is in effect a final order of the Board requiring the organization to register and more than 30 days elapse without compliance, it becomes the duty of each member of the organization to register personally (§ 8 (a)). Secondly, if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, each member not on the list who knows the organization to be registered and to have omitted his name must himself register within 60 days after obtaining such knowledge (§ 8 (b)). In either case, the individual is required to file a registration statement containing such information as the Attorney General may by regulations prescribe (§ 8 (c)).

Proceedings before the Board.—If an individual who the Attorney General believes is required to register under § 8 does not in fact register, the Attorney General may petition the Board (as in the case of an organization) for an order requiring the individual to register (§ 13 (a)).

Hearings.—The Attorney General's petition is heard by the Board in the same manner as a petition for an order requiring an organization to register (*supra*, pp. 73-74) (§ 13 (c) and (d)).

Reports and orders.—In each instance the Board must make a report stating its findings and issue an order either requiring the individual to register (§ 13 (g) (2)) or denying the Attorney General's petition (§ 13 (h) (2)).

6. *Fact of registration not admissible in any criminal prosecution and membership not to constitute per se a violation of any criminal statute*

The fact of the registration of any person as an officer or member of any Communist-action or Communist-front organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (§ 4 (f)). In addition, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute (*ibid.*).

7. *Cancellation of registration*

The Act establishes procedures whereby an individual or an organization which has once registered—whether with or without an order of the Board commanding him or it to do so—may procure the cancellation of his or its registration in the event of a change in the circumstances which originally required registration.

Application to the Attorney General.—Any organization registered under § 7 as an action or front group, and any individual registered under § 8 (see *supra*, pp. 76–77), may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration (§ 13 (b)).

Petition to the Board.—If the Attorney General denies the application, the organization or individual concerned may, within 60 days after such denial, file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of registration (§ 13 (b)). Section 13 (b) further provides that any individual whose name the Attorney General has declined pursuant to § 7 (g) to strike from an organization's registration statement listing him as an officer or member (see *supra*, pp. 71–72) may similarly petition the Board for an order requiring the Attorney General to strike his name.

Hearings.—The petition is heard by the Board in the same manner as a petition by the Attorney General requesting that an organization or individual be directed to register (§ 13 (c) and (d)).

Reports and orders.—In each case the Board must make a report stating its findings and issue an order granting (§ 13 (i)) or denying (§ 13 (j)) the petition.

8. *Judicial review and finality of Board orders*

The Act provides that any party aggrieved by any order of the Board be given full opportunity for judicial review in the United States Court of Appeals for the District of Columbia Circuit (or the circuit of the petitioning party's residence), with the possibility of further discretionary review by this Court on writ or certiorari (§ 14. (a)). On such review the Board's findings of fact, if supported by the preponderance of the evidence, are conclusive (*ibid.*).

Exhaustion of judicial review a prerequisite to an order of the Board becoming final.—An order of the Board does not become final, *i. e.*, enforceable, until full opportunity for judicial review has been exhausted or until review is foreclosed by failure to make timely application therefor (§ 14 (b)).

9. *The so-called "sanctions", or legal consequences of an organization's registration or of a final order to register*

When an organization registers under § 7, or when an order of the Board under § 13 requiring an organization to register becomes final under § 14 (b), the Act provides for the immediate occurrence of certain legal consequences—some affecting the organization as such, others affecting members of the organization. These consequences are, generally speaking, in the nature of

legal disabilities; they have come to be referred to in these proceedings as "sanctions" (see Op. 5, R. 2082), though this term is not used in the Act. In addition, upon the registration of an organization or when an order directing it to register becomes final, certain limitations are imposed upon the conduct of officers and employees of the United States and of "defense facilities," as defined in the Act, with respect to their relations with the organization and its members. These various legal consequences may be summarized and classified as follows:

(a) *Consequences to the organization as such*

The "labeling" requirements.—When an organization is registered or has been finally ordered to register, any publication of the organization transmitted by mail or in interstate or foreign commerce and intended to be circulated among two or more persons must bear on its face and on any wrapper in which it is contained the printed statement "Disseminated by [name of organization], a Communist organization" (§ 10 (1)). Similarly, radio and television broadcasts sponsored by the group must be identified as being "sponsored by [name of organization], a Communist organization" (§ 10 (2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (§§ 10, 15 (c)).

Denial of tax benefits.—Persons making contributions to any organization which is registered or has been finally ordered to register may not deduct the amount of their contributions from their gross taxable income notwithstanding any other provisions of law (§ 11 (a)), and no such organization may claim any tax-exemption privilege specified in § 101 of the Internal Revenue Code (§ 11 (b)).

(b) Consequences to members of the organization

Employment restrictions.—Section 5 (a) (1) provides that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from (A) concealing or failing to disclose their membership in seeking, accepting, or holding any nonelective federal employment, (B) holding such employment, (C) concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility,¹⁹ (D) working in any defense facility

¹⁹ A "defense facility" is defined in § 3 (7) as any plant, factory, airport, vessel, pier, etc. "designated and proclaimed by the Secretary of Defense pursuant to section 5 (b)." Section 5 (b) authorizes the Secretary of Defense to designate and proclaim, and from time to time revise, a list of facilities with respect to the operation of which he finds that "the security of the United States requires the application of the provisions of" § 5 (a). Section 5 (b) further provides for the publication of the list and revisions thereof in the Federal Register and the posting of notices of such designation in conspicuous places on the premises of listed facilities.

(this clause is applicable only to members of action organizations), or (E)²⁰ holding office in or being employed by any "labor organization" as defined in the National Labor Relations Act²¹ or representing any employer in proceedings under that Act.

Passports.—Members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (§ 6 (a)).

Provisions applicable to aliens.—Alien members of or aliens affiliated with organizations which are registered or have been finally ordered to register are excluded from admission into the United States, are deportable, and are ineligible for naturalization.²² The joining of or affiliating

²⁰ Added by the Communist Control Act of 1954, § 6, 68 Stat. 777.

²¹ *I. e.*, "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" (29 U. S. C. § 152 (5)).

²² These provisions were originally contained in §§ 22 and 25 of the Subversive Activities Control Act, which amended the immigration and naturalization laws so to provide. They are now contained in the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, §§ 212 (a) (28) (E) (exclusion), 241 (a) (6) (E) (deportation), and 313 (a) (2)

with an organization so registered or required to register within five years after naturalization, if naturalization occurs after the effective date of Immigration and Nationality Act of 1952, is declared to constitute *prima facie* evidence, warranting revocation of citizenship in a denaturalization proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of naturalization.²³

(c) *Consequences to government and defense-facility employees in their relations with the organization and its members*

Contributions to registered organizations forbidden.—When an organization is registered or has been finally ordered to register, officers and employees of the United States and of defense facilities,²⁴ having knowledge or notice of that

(G) and (H) (ineligibility for naturalization). If the alien can establish that he did not know the organization in question to be a Communist organization when he joined it and did not acquire such knowledge prior to the time it registered or was required to register, the provisions are by their terms inapplicable (except that members of action organizations are declared ineligible for naturalization without such qualifying language).

²³ As amended and carried forward in § 340 (c) of the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, 261..

²⁴ See fn. 19, *supra*, p. 81, for the definition of "defense facility."

fact, are prohibited from contributing funds or services to such group (§ 5 (a) (2) (A)).

Counseling violation of employment provisions.—Section 5 (a) (2) (B) makes it a punishable offense for an officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to advise or counsel any person whom he knows to be a member of such organization to perform or omit the performance of any act the performance or omission of which would constitute a violation of the employment provisions of § 5 (a) (1) (see *supra*, pp. 81-82).

Issuance of passports.—When an organization is registered or has been finally ordered to register as a Communist-action organization, officers and employees of the United States are prohibited from issuing passports to or renewing the passports of any individual who they know or have reason to believe is a member of such organization (§ 6 (b)).

10. Criminal penalties

Organizations.—Any organization which has been directed by a final order of the Board to register and which fails to do so within the time allowed, or which fails to file a required registration statement or annual report or to keep records as required, is punishable for each such

offense by a fine of not more than \$10,000 (§ 15 (a) (1)). Each day of failure to register is a separate offense (§ 15 (a)). Each violation of the labeling provisions of § 10 (see *supra*, p. 80) is similarly punishable (§ 15 (c)).

Individuals.—Each individual officer having a duty under § 7 (h) to register or to file a registration statement or annual report on behalf of an organization which has been finally ordered to register (see *supra*, pp. 75–76) is punishable for each failure to fulfill such duty by a fine of not more than \$10,000, or imprisonment for not more than five years, or both (§ 15 (a) (2)). Each individual having a duty to register personally under § 8 (see *supra*, p. 76) is similarly punishable, provided there is in effect with respect to him a final order of the Board requiring him to do so (§ 15 (a) (2); see *supra*, pp. 76–77, 79). In either case, each day of failure to register is a separate offense (§ 15 (a)). The willful making of a false statement or the willful omission of a fact required to be stated is similarly punishable (§ 15 (b)). Each false statement or willful omission constitutes a separate offense (§ 15 (b) (1)), and each listing of the name or address of any one individual is to be deemed a separate statement (§ 15 (b) (2)).

Any individual who violates any of the employment provisions or the contributions prohibition of § 5 (see *supra*, pp. 81–82, 83–84), the passport provisions of § 6 (see *supra*, pp. 82, 84),

or the labeling provisions of § 10 (see *supra*, p. 80) is similarly punishable for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or both (§ 15 (c)).

Act not to affect previously existing criminal statutes.—The Act provides that its provisions are to be construed as being “in addition to and not in modification of existing criminal statutes” (§ 17).

11: Communist-infiltrated organizations

The Act as originally passed defined and dealt with but two types of “Communist organization” (§ 3 (5))—the Communist-action organization (§ 3 (3)) and the Communist-front organization (§ 3 (4)). The Communist Control Act of 1954, c. 886; §§ 7–11, 68 Stat. 775, 777–780, amended the Act so as to define a third category of Communist organization, *viz*, the “Communist-infiltrated organization,” and to enact various restrictive measures with respect to such groups.

Communist-infiltrated organizations are not subject to the registration requirements of the Act. They are, however, subject to Board orders “determining” them to be Communist-infiltrated, which orders, when they become final, entail for such groups some of the same legal consequences which attach to action and front groups when registered or directed to register by a final

Board order. "Infiltrated" organizations are defined in § 3 (4A). Proceedings leading to a Board order determining an organization to be Communist-infiltrated are provided for in § 13A. Such orders are reviewable in the same manner as other orders of the Board (§ 14). The legal consequences which flow from a final Board order determining a group to be infiltrated are set forth in §§ 10, 11, 13A (h), and 13A (j).

12. Separability clause

The Act contains the customary separability clause providing that if any of its provisions or the application thereof to any person or circumstances is held invalid, the remaining provisions, or the application to other persons or circumstances of any provisions held invalid as to some, shall not be affected thereby (§ 32).

II

THE SUBVERSIVE ACTIVITIES CONTROL ACT IS CONSTITUTIONAL AS APPLIED TO PETITIONER

As we have already pointed out (*supra*, p. 42), what is immediately before the Court is (a) the Board's finding that the Communist Party of the United States is a Communist-action organization under the Act, and (b) the Board's order that the Party register as such. The court below thought that the Act is an "integrated unit" (Op. 4-7, R. 2081-2084), and that even at this

stage the registration requirements cannot be considered separately from certain of the statutory sanctions "which depend upon or flow from registration of the organization" (Op. 6, R. 2083). This view may well be correct. But it is also conceivable that—as respondent argued below—the Court may wish to defer passing upon the sanctions (or some of them) until they actually come into play, for the registration provisions—which are directly involved in this proceeding—have a purpose and vitality independent of any sanction.²⁵ In any event, the Act's separability clause (*supra*, p. 87) makes it clear that the registration provisions would survive even if one or more of the sanctions should be held invalid. Cf. *Electric Bond and Share Co. v. Securities and Exchange Commission*, 303 U. S. 419.

For these reasons, we shall first consider petitioner's contentions that the hearing and registration provisions are invalid as violative of the free-speech, self-incrimination, and due-process clauses of the Constitution (*infra*, pp. 89-162). We shall then separately reply to the arguments that the sanctions, which become operative when an order of the Board directing an organization to register becomes final, are invalid on various constitutional grounds (*infra*, pp. 162-209). In both aspects, we shall consider the Act's provisions only in so far

²⁵ See footnote 43, *infra*, p. 164.

as they apply to the Communist-action type of group; petitioner has been ordered to register as such a group, and no Communist-front organization—the other type subject to the registration provisions—is before the Court. See *United Public Workers v. Mitchell*, 330 U. S. 75, 89-90; *Watson v. Buck*, 313 U. S. 387, 402; *Electric Bond and Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 433-439, 443; *Peters v. Hobby*, 349 U. S. 331, 338.

A. THE HEARING AND REGISTRATION PROVISIONS ARE VALID

1. *The First Amendment does not prohibit Congress from requiring registration of, and disclosure of information by, domestic organizations dominated by foreign agencies whose purpose it is to establish a Communist dictatorship in this country*

The heart of the Act is the requirement that Communist-action organizations register with the Attorney General, disclose the names of their officers and members, and give financial accountings (*supra*, pp. 69-71, 73-74). A Communist-action organization is defined as any organization in the United States, other than one diplomatically accredited, which is substantially dominated or controlled by "the foreign government or foreign organization controlling the world Communist movement" and which operates primarily to advance the objectives of that movement (*supra*, p. 69). The "world Communist movement" referred to is that "world-

wide revolutionary movement" which Congress found to exist, "whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (*supra*, p. 67). After full hearing, the Communist Party has been found to be such a group. Congress has the power to require it to register and disclose information. There is no violation of the First Amendment.

(a) *Rights of free speech and press may be indirectly restrained in proper circumstances*

There is, of course, no better settled principle of constitutional law than that the freedoms guaranteed by the First Amendment are not absolute. *E. g.*, *Schenck v. United States*, 249 U. S. 47, 52; *Dennis v. United States*, 341 U. S. 494, 508. Even direct limitations on the freedoms protected by that Amendment are permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *Schenck v. United States*, *supra*, at 52; *Dennis v. United States*, *supra*, at 509-510. A *fortiori*, indirect limitations come within the rule. *American Communications Assn. v. Douds*, 339 U. S. 382, 402-404.

The law is filled with examples of statutes which place indirect restraints on freedom of speech or of the press, but which are nevertheless valid because the statute's objective lies within the power of Congress to bring about, and the restraint is a necessary and appropriate concomitant of the exercise of the power. The Hatch Act validly forbids the taking of active part in political campaigns by officers and employees in the executive branch of the Federal Government (Act of August 2, 1939, c. 410, § 9, 53 Stat. 1148; 5 U. S. C. § 118i), notwithstanding the obvious restraints imposed by that Act on such officers' and employees' freedom of speech and political expression. *United Public Workers v. Mitchell*, 330 U. S. 75, 94-104. The Federal Regulation of Lobbying Act (Act of August 2, 1946, c. 753, Title III, §§ 305, 307, 308, 60 Stat. 840-842; 2 U. S. C. §§ 264, 266, 267) validly requires all "those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to spread on the record pertinent information as to "who is being hired, who is putting up the money, and how much", notwithstanding the incidental inhibitory effect of this requirement on the exercise of First Amendment freedoms. *United States v. Harriss*, 347 U. S. 612, 625-626. The Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of

influencing national elections to keep exact accounts of all such contributions and to report publicly the names and addresses of all contributors as well as of persons to whom such expenditures are made (Act of February 28, 1925, c. 368, Title III, §§ 302-305, 43 Stat. 1070-1072; 2 U. S. C. §§ 241-244), though here, too, the requirement unquestionably imposes indirect restraints upon freedom of political expression. *Burroughs and Cannon v. United States*, 290 U. S. 534.

The unfair-labor-practice provisions of the National Labor Relations Act have led to certain valid restraints on free speech. *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U. S. 469; *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453. Newspaper companies are subject to regulation in the public interest, notwithstanding possible incidental restrictive effects on their freedom to publish. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 130-133; *Associated Press v. United States*, 326 U. S. 1, 19-20; *Mabee v. White Plains Publishing Co.*, 327 U. S. 178, 184; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 192-193; *Lorain Journal v. United States*, 342 U. S. 143, 155-156. Radio broadcasting stations engaging in discriminatory practices can be denied licenses without unlawfully encroaching on First Amendment rights, despite the indirect restraint on freedom of speech which

may result from such denials. *National Broadcasting Co. v. United States*, 319 U. S. 190, 226-227.

Likewise, the Foreign Agents Registration Act validly requires agents of foreign principals to register with the Attorney General and to submit a mass of detailed information relating to the agency relationship (Act of June 8, 1938, c. 327, 52 Stat. 631-633; 22 U. S. C. §§ 611 ff.). *United States v. Peace Information Center*, 97 F. Supp. 255, 261-263 (D. D. C.); see also *Viereck v. United States*, 318 U. S. 236, 241, where the constitutionality of the Act was assumed. The National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, validly denies the benefits of that Act to labor organizations unless each officer takes oath that he is not a member of the Communist Party (Act of July 5, 1935, c. 372, § 9 (h), as amended by the Act of June 23, 1947, c. 120, § 101, 61 Stat. 146; 29 U. S. C. § 159 (h)). *American Communications Assn. v. Douds*, 339 U. S. 382, 389-412. The postal laws validly require the publishers of newspapers and magazines, as a condition of their use of second-class mail facilities, publicly to disclose the names of the owners of these publications and to mark with the word "advertisement" all contents the insertion of which has been paid for (Act of August 24, 1912, c. 389, § 2, 37 Stat. 553; now 39 U. S. C. §§ 233, 234).

Lewis Publishing Co. v. Morgan, 229 U. S. 288. The Court has also upheld the provisions of a state statute requiring that associations having an oath-bound membership file with a state official sworn copies of their constitutions, oaths of membership, and the names of all officers and members. *Bryant v. Zimmerman*, 278 U. S. 63, 72-73.

In all these and similar cases, the question was not whether some indirect, incidental restraint on complete freedom of speech or of the press might result from the enforcement of the law enacted by the legislature. That there would be some such restraint was apparent in all these cases. The question was whether the objective of Congress was one within its power to seek to effect and, if so, whether the incidental restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law, as well as the nature, impact and scope of the restraint.

(b) *The evil at which the Act strikes is one of the gravest that could befall the nation*

The evil aimed at by the Hatch Act was the bad effect on government service of "political activity by government employees." — *United Public Workers v. Mitchell*, 330 U. S. 75, 95. The Regulation of Lobbying Act was aimed at the danger that "the voice of the people" might go unheard by Congress due to being "drowned

out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harris*, 347 U. S. 612, 625. The harm sought to be eliminated by the Corrupt Practices Act was "the corrupt use of money to affect elections." *Burroughs and Cannon v. United States*, 290 U. S. 534, 548. The injury at which the Foreign Agents Registration Act was directed was the "spreading [of] foreign propaganda" in this country by unidentified agents of foreign principals. *Viereck v. United States*, 318 U. S. 236, 241. The evil aimed at by the non-Communist affidavit cause of the amended National Labor Relations Act was the obstruction of commerce due to "political strikes." *American Communications Assn. v. Douds*, 339 U. S. 382, 387-389. In all these cases, the fact that incidental and indirect restraints upon First Amendment freedoms resulted from the steps taken by Congress to combat those evils was held not to invalidate the legislative remedy adopted. However, the evils at which those statutes were directed, grave as they were, were relatively trivial compared to the evil at which this Act strikes.

That evil is nothing other than the threatened destruction, through force, violence, and deceit, of our constitutional form of government, the loss of our national independence and of our cherished liberties, and the passing of the nation

under the domination of a ruthless foreign dictatorship (§ 2). The world Communist movement, including its domestic manifestations, declared Congress in summing up the purposes of the Act, presents "a clear and present danger to the security of the United States and to the existence of free American institutions, and make[s] it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States" (§ 2 (15)).

It is obviously a matter of the gravest concern that there exists in this country such a highly organized conspiratorial group controlled and dominated by a foreign country or foreign organization, the principal efforts of which are directed to furthering the interests of that foreign country or organization to the detriment of the United States. "Antipathy to domination or control by a foreign government," as the court below observed (Op. 8, R. 2085), "or even to interference on the part of a foreign government, is a basic policy in this nation. It was one of the compelling reasons for the making of the Constitution in replacement of the Confederation. * * *"

As we have seen, Congress has for more than twenty years regarded the threat to the United States represented by the Communist movement as a legitimate subject of congressional inquiry and legislation (*supra*, pp. 44-65; and see pp. 216-228 of the *Internal Security Manual*, S. Doc. No. 47, 83d Cong., 1st sess., where the many hearings held by committees of Congress investigating subversive activities from 1930 to 1953 are synopsized). The general power of Congress not only to conduct inquiries in this area, but to legislate on the basis of the information thus obtained, has been repeatedly recognized by this Court as well as others. *E. g.*, *Galvan v. Press*, 347 U. S. 522, 529; *Carlson v. Landon*, 342 U. S. 524, 534-536; *Harisiades v. Shaughnessy*, 342 U. S. 580, 590; *Dennis v. United States*, 341 U. S. 494; *American Communications Assn. v. Douds*, 339 U. S. 382, 387-389; *Lawson v. United States*, 176 F. 2d 49, 51-52 (C. A. D. C.), certiorari denied, 339 U. S. 934; *Barsky v. United States*, 167 F. 2d 241, 244-247 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States v. Josephson*, 165 F. 2d 82, 88-92 (C. A. 2), certiorari denied, 333 U. S. 838.

(c) *In the light of the evil, the registration requirement does not invalidly restrict free speech, press, or association*

In the survey we have given of the cases in which the Court upheld legislation touching upon

the constitutionally protected areas of political association and expression of ideas (*supra*, pp. 90-94), "disclosure" cases are prominent. *United States v. Harriss*, 347 U. S. 612, 625 (Registration of Lobbying Act); *Burroughs and Cannon v. United States*, 290 U. S. 534 (Federal Corrupt Practices Act); *Bryant v. Zimmerman*, 278 U. S. 63 (New York Anti-Ku-Klux-Klan statute); *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (ownership-disclosure requirements of the postal laws); cf. *Viereck v. United States*, 318 U. S. 236 (Foreign Agents Registration Act).

The basic rationale underlying all these decisions is that it is in the interest of both free speech and free association that Congress and the public be adequately and correctly informed, at least where the dangers stemming from non-disclosure are serious. As Mr. Justice Black, with whom Mr. Justice Douglas concurred, stated with respect to the Foreign Agents Registration Act in his dissenting opinion in *Viereck v. United States*, 318 U. S. 236, 251: ²⁶

* * * Resting on the fundamental constitutional principle that our people, ade-

²⁶ The constitutionality of the Foreign Agents Registration Act was not challenged in the *Viereck* case, either in the Court of Appeals (*Viereck v. United States*, 130 F. 2d 945 (C. A. D. C.), reversed, 318 U. S. 236; *Viereck v. United States*, 139 F. 2d 847 (affirming conviction following retrial), certiorari denied, 321 U. S. 794), or in this Court. This Court's reversal of *Viereck*'s first conviction was based on grounds not here material.

quately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. * * *

See also *United States v. Peace Information Center*, 97 F. Supp. 255 (D. D. C.). And the *Harriss* decision pointed out (347 U. S. at 625-626) the importance of disclosure of facts where a serious evil grows out of secrecy or nondisclosure.²⁷

In the light of our knowledge of the world Communist movement and of the evil to be faced (*supra*, pp. 44-65, 95-97), there would seem to be little doubt that this device of registration and disclosure can properly be applied to the Communist

²⁷ In addition to judicial approval, the principle of registration and disclosure has been widely recognized by legal writers as a constitutional and desirable remedy against potential abuses of political freedoms. See *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 164; Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 Pub. Opin. Quart. 27 (1942); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 Ill. (Northwestern Univ.) L. Rev. 193, 213; Ernst and Katz, *Speech: Public and Private*, 53 Col. L. Rev. 620, 626; Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 204-213.

Party, now that it has been found, after full hearing, to be directed and controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 406-407. If the leaders of the Communist Party may be imprisoned for conspiring to advocate the overthrow of the Government by force and violence (*Dennis v. United States*, 341 U. S. 494; see also fn. 8a, *supra*, p. 49), certainly the Party itself may be compelled to register and disclose its officers, members, funds, and operations. Whatever diminution of the Party's influence or effectiveness results from this publicity—including a possible falling-off in its "peaceful" and "non-seditious" activities—is a valid consequence of the Government's and the public's right to be informed about this particular organization's activities and connections. Its seditious connection with the Soviet Union plainly warrants the kind of disclosure Congress has required. See also, *infra*, pp. 165-178, for further discussion in connection with the "labeling" sanction.

Thomas v. Collins, 323 U. S. 516, on which petitioner relies, dealt with the wholly different problem of a state's requirement that any individual must register as a condition of the exercise of his normal right to make a lawful public speech enlisting support for a lawful and peaceful movement (the trade union movement) and a peaceful and lawful

activity (joining a labor union). There was no problem of sedition, subversion, or of a domestic organization controlled by a foreign dictatorship and dedicated to forcible overthrow of this Government. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 403-404. And insofar as the registration provisions of the present Act may curtail the "peaceful" and "non-seditious" utterances and activities (but see *infra*, pp. 166-167) of the Communist Party, *De Jonge v. Oregon*, 299 U. S. 353, is clearly inapposite. There, the disability imposed was criminal punishment (299 U. S. at 365), not the much milder form of "restraint" in the form of registration and disclosure requirements; and it is also not without significance that the circumstances of the *De Jonge* case took place in an earlier era (1934), before most of the more significant events occurred and the knowledge was acquired on which the present Act is grounded (see *supra*, pp. 45-49, 56-61).

2. *Neither the registration provisions of the Act nor the Board's order violates the Fifth Amendment's prohibition against compulsory self-incrimination*

Petitioner also urges (Br. 82-90) that the registration provisions of the Act as well as the order under review, directing it to register, violate the Fifth Amendment's prohibition against compulsory self-incrimination. "The legislative scheme of the Act," it argues, "culminates in an attempt to coerce confessions of membership in the Communist Party * * *. This is a crass vio-

lation of the privilege against self-incrimination. *Blau v. United States*, 340 U. S. 159" (Pet. 59; Br. 83). The contention is without merit for a number of reasons.

(a) *The privilege against self-incrimination applies only to natural individuals, of whom there is none before the Court at this time; the present case is not a proper vehicle for the litigation of self-incrimination issues*

It is settled that the privilege against self-incrimination "is essentially a personal one, applying only to natural individuals." *United States v. White*, 322 U. S. 694, 698. It may be invoked neither by a corporation (*Wilson v. United States*, 221 U. S. 361; *Essgee Co. v. United States*, 262 U. S. 151, 155-156; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 205) nor by an unincorporated organization or association, such as petitioner. *United States v. White, supra*, 322 U. S. 694, 699. The order under review is directed against petitioner alone, not against any natural individual, and petitioner alone is before the Court at this time. While it is true that artificial entities such as corporations and unincorporated associations can act only through individuals, sight must not be lost of the simple fact that only natural individuals are protected by the privilege and no such individual is a party to this case.

Assuming *arguendo* that the officer or officers who will eventually have the duty to effect the registration of petitioner will be personally privileged to decline to do so, or at least to assert and

litigate a claim of privilege, that fact does not render either the registration provisions of the Act or the registration order invalid. Consequently, the instant case is not an appropriate vehicle for the litigation of the self-incrimination issue, which is entirely hypothetical at this time.

(i) *The privilege against self-incrimination is one which must be explicitly claimed and no such claim has thus far been made; it cannot be assumed that a claim will inevitably be made or, if made, that it must necessarily be honored*

In the first place, the privilege against self-incrimination is a privilege which must be personally and explicitly claimed. *Quinn v. United States*, 349 U. S. 155, 162; *Emšpak v. United States*, 349 U. S. 190, 194; *Rogers v. United States*, 340 U. S. 367, 370; *Smith v. United States*, 337 U. S. 137, 150; *United States v. Monia*, 317 U. S. 424, 427; *United States v. Murdock*, 284 U. S. 141, 148; *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 113. "A witness' privilege against self-incrimination," as Judge Bazelon himself stated in an opinion rendered prior to his dissent below, at an earlier stage of this case, "must be claimed personally, at the time the alleged incriminating questions are propounded, not before they are asked at all" (*Communist Party of the United States v. McGrath*, 96 F. Supp. 47, 52 (D. D. C.) (concurring opinion), stay denied, 340 U. S. 950). It is

"merely an *option of refusal*, not a prohibition of inquiry." 8 Wigmore, *Evidence* (3d. ed. 1940), § 2268.

There has been no claim of privilege thus far, and, as the court below observed (Op. 19-20, R. 2096-2097), there may never be one. Since this Court does not anticipate constitutional issues (*Peters v. Hobby*, 349 U. S. 331, 338), petitioner's attempt to litigate the self-incrimination issue in this case, before it is raised, would clearly seem to be premature on general principles. Cf. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 443. The question of the availability of the privilege to an officer or officers of petitioner will not arise until the order of the Board becomes final and the duty to bring about petitioner's registration comes into being. If at that time a privilege is claimed, it can then be litigated.

Petitioner argues, however, that the principle requiring that the privilege be claimed to be enjoyed is inapplicable in a proceeding of this type for the reason that "the Act gives the officers no opportunity to claim the privilege and provides no tribunal before which they can make the claim" (Br. 87). The contention is untenable. As petitioner acknowledges (*ibid.*), the Act provides a 30-day period after a registration order becomes final within which to effect registration (§ 7 (c) (3)) before criminal liability

under § 15 (a) for failure to register is incurred. We believe that that is the period during which an officer of petitioner having the duty to effect petitioner's registration, who desires to claim the privilege, should do so. As for the "tribunal" before which the claim should be made, we believe that *United States v. Sullivan*, 274 U. S. 259, provides the answer. In that case the Court held that a taxpayer should make his claim of privilege respecting his sources of income in the tax return itself if necessary. So here, by analogy, the privilege could be claimed on the registration form required to be filed with the Attorney General. (See also *infra*, pp. 117-121).

There are, moreover, several reasons why it cannot justifiably be assumed at this time that a substantial claim of privilege will inevitably be made and be required to be honored when petitioner is confronted by the statutory requirement that it register, so that (according to the argument) the constitutionality of the requirement might as well be settled in this proceeding.

a. Presumably, the basis of any future claim of privilege on the part of an officer of petitioner having the duty to effect the registration will be the tendency of his act of filing the required registration statement to incriminate him under the Smith Act (18 U. S. C. § 2385). That is, it will be claimed by the officer required to file the statement that the very act of filing, even if he

were to omit his own name from the membership list, would constitute an admission that he is a member and officer of petitioner, and thus furnish "a link in the chain of evidence" required to convict him under that Act. See Br. 83, citing *Patricia Blau v. United States*, 340 U. S. 159, 161. But, as the court below observed, the top officials of petitioner, who are the ones who will have the duty of filing the registration statement,²⁸ "have never attempted to conceal their membership or their places of leadership" (Op. 20, R. 2097). Hence, there is "no basis for assuming that they would claim protection against a mere revelation of their membership" (*ibid.*).

Furthermore, a claim of privilege on their part would be on a different footing from a similar claim made by a person not publicly known as a Communist Party member or functionary if he were asked whether he is a member of petitioner.

²⁸ Section 7 (h) of the Act places the duty of effecting the registration of an organization required by § 7 to register, and which fails to do so, on "the executive officer (or individual performing the ordinary and usual duties of an executive officer)," "the secretary (or individual performing the ordinary and usual duties of a secretary)," and such other "officer or officers * * * as the Attorney General shall by regulations prescribe." Under the regulations, the following additional officials share the registration duty with those named in the Act: (a) the president, chairman, or chief officer, by whatever title he is known; (b) the vice-president or vice-chairman; (c) the treasurer; and (d) members of the governing board, council, or body (28 C. F. R. § 11.205).

Cf. Patricia Blau v. United States, 340 U. S. 159; *Irving Blau v. United States*, 340 U. S. 332; *Rogers v. United States*, 340 U. S. 367, 372-373.

It is a matter of common knowledge that each of the individuals who would have the duty of effecting petitioner's registration when the time comes, if petitioner should fail to register itself (see fn. 28, *supra*, p. 106), is a member and high official of the Party. Many of them have already been prosecuted and convicted under the Smith Act without the benefit of any forced concessions on their part of membership in petitioner. *Dennis v. United States*, 341 U. S. 494; *United States v. Flynn*, 216 F.2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.²⁹ It is absurd to suppose that a prosecutor, even assuming the Government might ever bring new criminal proceedings against them for violation of the Smith Act, would find it necessary to establish their membership and high official position in petitioner from the fact that they filed a registration statement under the Subversive Activities Control Act. The privilege against self-incrimination, as this Court has emphasized, "presupposes a real danger of legal detriment arising from the disclosure." *Rogers v. United States*, *supra*, 340 U. S. 367, 372-373. The protection afforded by

²⁹ All eleven of the defendants in *Dennis* and several of the thirteen defendants in *Flynn* were members of the National Committee of petitioner.

the privilege "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason v. United States*, 244 U. S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States*, 341 U. S. 479, 486.

To argue, as does petitioner, that for a member of petitioner's governing board to be required to perform an act which by implication establishes his membership in petitioner amounts to compulsory self-incrimination, when that person has never sought to conceal and indeed has many times conceded his membership, is too mechanical an application of the constitutional guaranty. To force an admission of membership from an obscure or concealed member of petitioner is one thing (cf. *Patricia Blau v. United States*, 340 U. S. 159). To require, say, the National Chairman of petitioner to effectuate petitioner's registration under the Act and thus, incidentally, to admit what he has never denied or attempted to conceal and what has been indisputably proved—that he is a member and officer of petitioner—is another. In the one case there is "a real danger of legal detriment arising from the disclosure" (*Rogers v. United States, supra*, 340 U. S. at 373); in the other, there is nothing of the sort.

b. In evaluating the merit or lack of merit of a claim of privilege which an officer of petitioner might hereafter advance, one of the fundamental principles is that the privilege in question is a privilege against self-incrimination. The claimant may not, under the guise of protecting himself against self-incrimination, seek to shield other persons. *Rogers v. United States*, *supra*, 340 U. S. 367, 371; *United States v. Murdock*, 284 U. S. 141, 148; *Hale v. Henkel*, 201 U. S. 43, 69; *Brown v. Walker*, 161 U. S. 591, 609. Relevant to the issue of the *bona fides* of the claim of privilege against self-incrimination, in addition to the considerations already mentioned, would be the fact that, under the terms of the Act, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute, and the further fact that the registration of any person under the Act as an officer or member of any Communist organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (§ 4 (f)). While the latter provision is a limited and not an absolute grant of immunity against prosecution (cf. *Counselman v. Hitchcock*, 142 U. S. 547, with *Brown v. Walker*, 161 U. S. 591, and *United States v. Ullman*, 221 F. 2d 760 (C. A. 2), pending on writ of certiorari, No. 58, this Term), it is nevertheless a pertinent factor to be considered in evaluating

the merit or lack of merit of a claim of privilege, that is to say, the verity of the claimed fear of self-incrimination.

c. Another reason why it should not be assumed that a claim of privilege will inevitably be made and honored is to be found in the prior history of this very case. In 1951, following the Attorney General's filing with the Board of his petition for an order directing registration, petitioner sought in the United States District Court for the District of Columbia to enjoin the Attorney General from proceeding further. The requested injunction was denied by a statutory three-judge court. *Communist Party of the United States v. McGrath*, 96 F. Supp. 47, stay denied, 340 U. S. 950. Judge Bazelon, who dissented below, was one of the members of the three-judge court. As pointed out by Judge Bazelon in his concurring opinion in the injunction proceeding (96 F. Supp. at 50), and as he recalled in his dissent below (Op. 86, R. 2163, n. 39), one of the grounds urged by petitioner for enjoining hearings before the Board was that its defense before the Board required the filing of an answer and the giving of testimony by its officers and that, since "such testimony would necessarily entail their admission of Communist Party affiliations" (Op. 86, R. 2163, n. 39), such officers "will not appear for fear of self-incrimination or, if subpoenaed, will invoke their privilege and, as

a result the Party's defense will necessarily fail" (96 F. Supp. at 50). Notwithstanding these representations, after the dismissal of its suit to enjoin the proceedings (from which dismissal it did not appeal), officials of petitioner did appear and testify at the Board hearings (see R. 136 [2049]).

This instance shows that the making of a future claim of privilege is never "inevitable," however likely it may seem or be represented to be. Two of petitioner's three witnesses before the Board, John Gates and Elizabeth Gurley Flynn, voluntarily admitted on the witness stand that they were members of petitioner's governing body, the National Committee of the Communist Party (R. 1199, 1275). As such, assuming they still hold those offices, they will be among the persons having the duty to effect the registration of petitioner when the order directing such registration becomes final (28 C. F. R. § 11.205 (d); see fn. 28, *supra*, p. 106). If either should hereafter invoke the privilege against self-incrimination as justification for refusing to register petitioner, it would become an important point of inquiry, in determining the validity of such claim, whether it was made in good faith and whether it should not be rejected on the ground that they had waived their privilege by having taken the stand and voluntarily admitted their membership and high official positions in petitioner. Cf.

Rogers v. United States, 340 U. S. 367, 372-373.
See the opinion below, Op. 22, R. 2099.

d. It is not our purpose here to explore all the ramifications of the question of the possible privilege of an official to refuse to effect petitioner's registration of petitioner on the ground that to do so would tend to incriminate him. On the contrary, our position is, as we have stated, that this question is not in this case at this time and has been prematurely raised by petitioner. Our purpose has been rather to refute the Party's contention that (1) the claim is certain to be made eventually, and that (2) when made it must certainly be upheld, so that (3) it should in the interest of economy be settled in this case, (4) in favor of upholding the claim. We submit that it is clear from what has been said that the premises of this argument are untenable; it cannot justifiably be assumed in this case either that a claim of privilege is certain to be made as soon as the order becomes final, or that, if and when made, it will present a plain and simple issue which must be resolved in favor of the claimant.

(ii) *Even assuming that a claim of privilege will be made and must be honored, this would make the order to register at most unenforceable, not void*

Even if it be assumed, moreover, that a claim of privilege will be made by each and every one of the officials of petitioner having the duty of

effecting petitioner's registration (see (fn. 28, *supra*, p. 106), and that such a claim must of necessity be upheld, this would not render either the registration provisions of the Act or the order of the Board invalid. The order to register should still be upheld in this proceeding. "[T]he utmost result," as the court below observed, "would be that the statute and order would be unenforceable" (Op. 23, R. 2100). The distinction is important for at least three reasons. First, the non-enforceability of the order to register would not affect the "sanctions" or disabilities which come into being when the order to register becomes final; these have a vitality separate and apart from the registration process and do not depend upon actual registration (see *supra*, pp. 79-84). Secondly, the non-enforceability of the order could be removed by a grant of immunity from prosecution for any offense of which a prospective registerer of petitioner might fear to incriminate himself. See *Brown v. Walker*, 161 U. S. 591; *United States v. Ullman*, 221 F. 2d 760 (C. A. 2), pending on writ of certiorari, No. 58, this Term.³⁰ Thirdly, an important public

³⁰ It is probable that such a grant of immunity would require a new statute. The court below suggested the possibility that immunity might be granted under 18 U. S. C. § 3486 (c), one of the immunity provisions created by the Act of August 20, 1954, c. 769, § 1, 68 Stat. 745 (see Op. 22-23, R. 2099-2100). It is true, as the court observed, that "[u]nder that statute the courts have broad powers to grant

function is served by the Board's finding that the petitioner is a Communist-action organization and should register, regardless of whether the registration can actually be effectuated; Congress desired to have the facts sifted and established by quasi-judicial proceedings and then made known to the public (*supra*, pp. 88, 98-100).^{30a}

Petitioner's (Br. 88) and the dissenting judge's (Op. 84-85, R. 2161-2162) reliance on *Boyd v. United States*, 116 U. S. 616, as authority for their view that the Act should be declared invalid as violative of the self-incrimination clause even in the absence of a claim of privilege, is misplaced. That decision invalidated a statute which presented to a suspected violator of the

immunity, upon application of the Attorney General, in proceedings before them involving violations of the statute here involved" (Op. 22, R. 2099). However, the immunity statute in question is limited by its terms to cases or proceedings "before any grand jury or court of the United States" involving the national security. This would seem to exclude the possibility of granting immunity in connection with the process of registering organizations with the Attorney General. However, the fact that new legislation would probably be required to authorize the granting of immunity in connection with registration proceedings does not affect our argument that, because of the possibility of granting immunity, the order is not invalid merely because it might not be enforceable without such a grant.

^{30a} It should be recalled that organizations found, after hearing, to be "Communist-infiltrated" are not required to register (*supra*, pp. 86-87); as to these organizations, Congress was content with the Board's order and findings.

revenue laws the alternative of either (1) producing his private books and records in refutation of charges alleged by the Government to be based on what those books and records would show or (2) suffering the charges to be taken as confessed.³¹ The statute did not contemplate that the suspected violator could be excused from producing his books and records by a claim of the privilege against self-incrimination.

In the context of such a statute, a claim of privilege would have been quite meaningless. For this reason it is not surprising that nowhere in this Court's opinion is there any discussion of the necessity that the privilege against self-incrimination be specifically claimed as a prerequisite

³¹ The statute provided in pertinent part as follows: "In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court * * * may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court * * *; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. * * *" (116 U. S. at 619-620).

to its judicial consideration—the feature of self-incrimination cases so prominently mentioned in all the later cases (see *supra*, p. 103). The statute was held void as necessarily conflicting with the privilege. In the case at bar, on the other hand, there is no reason to believe that a valid claim of privilege will or must be rejected, and certainly the Act, unlike the statute in *Boyd*, does not deny the privilege to a person who could validly claim it. In other words, the *Boyd* statute flatly denied the privilege to one who could properly claim it and wished to do so; the Act involved here does no such thing.

Furthermore, as was pointed out by the court below (Op. 23-24, R. 2100-2101), the *Boyd* case dealt with personal, private papers—a fact on which the *Boyd* opinion laid great emphasis (116 U. S. at 622, 623, 624, 630, 633, etc.) and which was, as the court below said, “a key to the decision” (Op. 23, R. 2100). In all the later cases in which *Boyd* is discussed, this Court has emphasized that feature of the case. See, *e. g.*, *Wilson v. United States*, 221 U. S. 361, 377; *Essgee Co. v. United States*, 262 U. S. 151, 158; *Nathanson v. United States*, 290 U. S. 41, 47; *United States v. White*, 322 U. S. 694, 699; *Shapiro v. United States*, 335 U. S. 1, 33. Here, on the other hand, as we shall stress (see *infra*, pp. 117-121), the books and records which would reflect the data to be included in the registration

statement are not personal but organizational records—the distinction which forms the very basis of this Court's *White* decision, 322 U. S. 694 (see *supra*, p. 102; *infra*, pp. 117–121).

(b) *In any event, the officers of petitioner, having the duty under the Act and regulations to effect the registration will not be personally privileged to refuse to do so*

If the Court should reject our argument that it need not and should not now pass upon the issue of whether an officer of the Party can validly claim the privilege as a ground for not registering the Party, and should desire to determine that issue in this proceeding, our position would be that the privilege is not available to such officers. In *United States v. White*, 322 U. S. 694, the Court held not merely that an organization or association cannot invoke the privilege against self-incrimination, but that an officer of an organization or association who has custody of its records, if called upon to produce them pursuant to a subpoena, may not lawfully refuse to do so even if they would tend to incriminate him personally. “[T]he papers and effects which the privilege protects,” this Court said, “must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. * * * But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely

personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally" (322 U. S. at 699).

The rationale of the *White* case is equally applicable, we submit, to the case at bar. Cf. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 Univ. of Chi. L. Rev. 687, 720. This Court has, in fact, specifically cited the *White* case as authority for the proposition that one of this very petitioner's officers on the local level—the Treasurer of the Communist Party of Denver—"had no privilege with respect to the books of the Party, whether it be a corporation or an unincorporated association." *Rogers v. United States*, 340 U. S. 367, 371-372.

Nor is the rationale of *White* inapplicable on the ground that in *White* physical records were in question, while the issue here is the compulsory submission of a registration statement containing the names and addresses of officers and members

of petitioner and an accounting of moneys received and expended. For, as the court below said, the data required to be contained in the registration statement, "are reproductions of or extracts from organization records" (Op. 17, R. 2094). If the officer of petitioner having custody of its records, showing the names and addresses of its officers and members and the sources and modes of expenditure of its funds, may be required to submit those records pursuant to a subpoena *duces tecum*, notwithstanding his claim that they tend to incriminate him personally, it would be an exaltation of form over substance to hold that he may not be required to transpose such data to a registration form to be filed as required by the Act. Whether the records reflecting the required data "are kept formally or informally is immaterial," as the court below observed, since "[n]o additional explanatory testimony is required by this statute" (Op. 18, R. 2095). Indeed, there is authority for the view that, to a limited extent, in cases where the compellability of the production of records is established, oral testimony "auxiliary to the production" may also be compelled. *United States v. Field*, 193 F. 2d 92, 97 (C. A. 2), petition for certiorari dismissed, 342 U. S. 908; *Pulford v. United States*, 155 F. 2d 944, 947 (C. A. 6). For example, an officer who has been compelled to produce documents which incriminate him may also be required to

testify as to their genuineness (*United States v. Austin-Bagley Corporation*, 31 F. 2d 229, 234 (C. A. 2), certiorari denied, 279 U. S. 863; *United States v. Daisart Sportswear*, 169 F. 2d 856, 861-862 (C. A. 2), reversed on other grounds *sub nom. Smith v. United States*, 337 U. S. 137) or to explain incomplete, illegible, or abbreviated entries. *Fleming v. Silverman*, 7 F. R. D. 29, 31 (N. D. Ill.). Cf. *Porter v. Heend*, 6 F. R. D. 588, 589-590 (N. D. Ill.).

Judge Bazelon, dissenting below, attempted to distinguish the *White* case on the ground, among others, that the officer executing a registration statement is required to do more than produce records of the organization he is registering; that is, he is required to prepare a statement containing data which may or may not be entirely contained in the organization's records (Op. 82-83, R. 2159-2160). To the extent that any required data might not be reflected in the records, he pointed out, the officer is required to rely on his own personal knowledge, and if he has to rely on his own personal knowledge, the information he supplies is to that extent "forced from [his] lips * * *, rather than obtained from the records" (Op. 83, R. 2160). But the argument that, because some of the information called for in a statement required to be filed may be privileged, no statement at all need be filed, has been specifically rejected by this Court. See *United States*

v. Sullivan, 274 U. S. 259, holding that the fact that some of the answers called for on an income tax return form may be incriminating does not excuse a failure to file any return at all, the proper course being to file a return and claim the privilege, where the facts warrant, with respect to specific questions. Similarly with respect to a registration statement, even if it be assumed that the registering officer has a privilege with respect to called-for data not found in the organization's records, he would be required to file as complete a statement as possible based on the records, and claim his privilege with respect to the rest.³²

(c) The validity of the personal registration requirements of Section 8 is not in issue since no individual member of petitioner has been required to register and none is before the Court

The court below was obviously correct in holding that the validity of the personal registration requirements of § 8 of the Act is not presented in this case (Op. 24-25, R. 2101-2102). As already noted, that section provides, first, that individual members of Communist-action organ-

³² Thus, for example, if the filing official were known by more than one name and he feared that the listing of his *aliases* would tend to be self-incriminatory for some reason (see Op. 24, R. 2101), he could indicate in the registration statement that he was claiming his privilege with respect to his own *aliases*, though, as the court below indicated (*ibid.*), he could not do so with respect to the *aliases* of others.

izations must register personally as members if their organization has been finally ordered to register and fails to do so (§ 8 (a)), and, secondly, that if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, the members whose names are omitted must register themselves as members (§ 8 (b)). See *supra*, pp. 76-77. Section 8 is thus "an alternate, rather than an attachment, to the registration of the organization. As such it poses a separate and independent problem from that posed by the requirement for organization registration. To reach the problem posed under Section 8 we would have to assume that the Party will not register if it is finally ordered to do so, or that if it registers its membership list will be incomplete. But we cannot make such assumptions" (Op. 25, R. 2102). Self-incrimination questions pertaining to the personal registration requirements of § 8 are thus even more premature than those pertaining to the organizational registration requirements of § 7. They are hypothetical questions which may never arise in justiciable form. The Act, moreover, contemplates the institution of proceedings before the Board, culminating in an order, subject to full judicial review, directed to an individual and ordering him to register, as the exclusive means of enforcing § 8 (see §§ 13 (a), (c), (d), (g) (2),

14 (a), (b), 15 (a) (2); and see *supra*, pp. 76-77, 79). For these reasons, the personal registration provisions of § 8 are plainly not before the Court. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 443.

3. *The registration provisions are in accord with due process*

Petitioner challenges the registration provisions of the Act as violative of due process in a number of respects (Br. 41-60, 64-82), none of which, we submit, has merit.

(a) *The Act does not predetermine petitioner's liability to registration so as to render the proceedings before the Board a formality*

Petitioner first urges (Br. 41-45, 56-60) that the Act violates due process because it "predetermines" (Br. 42, 43, 45, 57, 59), by "legislative fiat" (Br. 43, 45, 59), a decision by the Board requiring it to register. The Act contains, it is charged, a "built-in finding that petitioner is a Communist-action organization" (Pet. 50; Br. 26), and the quasi-judicial proceeding before the Board was therefore a mere formality. Petitioner's argument, however, is founded on an unwarranted oversimplification of the Act's terms. It seeks to ignore, or unjustifiably to discount the importance of, crucial language in the § 3 (3) definition of a "Communist-action" organization.

(i) Under the definition of § 3 (3), a domestic organization which is not "substantially directed,

dominated, or controlled" by the foreign government or foreign organization controlling the world Communist movement, or which does not "operate primarily to advance the objectives" of that movement, is not a "Communist-action organization" and is not subject to the registration and other provisions of the Act, regardless of how "communistic" its philosophy might be, or how deep might be its bonds of sympathy and kinship with the foreign government or organization. Both conditions, it is to be observed, must be fulfilled for the definition to apply. Either alone is insufficient.

It is therefore entirely without warrant to assert, as petitioner does, that the Board had no real function to perform so far as petitioner was concerned, or that it was, and was meant by Congress to be, no more than a "rubber-stamp" designed to place a predetermined label on petitioner. See *Communist Party of the United States v. McGrath*, 96 F. Supp. 47, 50 (Judge Bazelon concurring). That Congress may have confidently believed, on the basis of evidence adduced at congressional hearings, that petitioner would fall within the definition of § 3 (3) is of no moment so far as the requirements of due process are concerned. Congress supposes in the case of many of the statutes it passes that specific organizations or persons will be subject to their terms. As the court below observed, "A statute is not

necessarily null merely because it fits a known person. Many valid statutes do" (Op. 40, R. 2117).

The important point is that Congress required proof of the two fundamental operative facts, referred to above, by a preponderance of the evidence in proceedings before the Board; and made the Board's findings subject to judicial review, before the obligation to register or any other requirement of the Act could become effective. The congressional findings as to the existence of a world and an American Communist movement do not make the Act operative against petitioner. Further crucial findings were required to be made, on proof, before that could occur, viz, that petitioner is substantially dominated and controlled by the foreign government or organization controlling the world Communist movement and is operating primarily to advance the objectives of that movement.

The decisions cited by petitioner (Br. 56-57), of which *Tot v. United States*, 319 U. S. 463, is representative, do not aid petitioner's argument. These cases concern the validity of statutory presumptions under the due process clause. They hold that, in the language of *Tot*, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary be-

cause of lack of connection between the two in common experience" (319 U. S. at 467-468). But, as we have just pointed out and as observed by the court below (Op. 43, R. 2120), the Subversive Activities Control Act creates no statutory presumptions in this connection. Rather, the Act provides freely for trial of the two issues, stated above, which were left to the Board. We point out below (*infra*, pp. 132-150) that the eight factors listed in § 13 (e) do not constitute statutory "presumptions."

(ii) Furthermore, due process does not require, as petitioner contends, that the legislative findings of § 2 be the subject of redetermination in a "free adjudication of the facts" in the quasi-judicial proceedings before the Board (Pet. 48; Br. 57-59). This argument confuses two sets of facts—the *legislative* facts, or those facts which have been found by the legislature itself after investigation to exist and to require the legislative action taken, and the *adjudicative* facts which, on proof in adversary litigation, bring a specific person or organization within the purview of the legislation, or otherwise make the general terms of the legislation specifically applicable. See McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 315-318; Davis, *Official Notice*, 62 Harv. L. Rev. 537, 549-560.

Legislative facts are general conclusions which support the policy of a particular law, and can

be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated powers. *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 465-466; *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153. The facts on which the legislature acted can frequently be the subject of judicial notice; in other cases the courts may make inquiry to determine whether there is a reasonable basis for the legislative action. *United States v. Carolene Products Co.*, *supra*, 304 U. S. at 153; *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209-210; *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 547-548; see McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 316-317. But, at most, the inquiry is as to whether the legislature has acted reasonably.

Here, Congress recorded in § 2 the basis for its action, the threat to the United States presented by the Communist movement. The existence of that threat and of that movement are recognized facts of modern history. See *supra*, pp. 44-61. Congress cannot be accused of irrationality in taking account of them. Cf. *Carlson v. Landon*, 342 U. S. 524, 535-536. Due process in adversary proceedings, whether before courts or quasi-judicial bodies like the Board, does not require formal proof of these basic facts of which Congress took official notice. The existence of the Communist movement and the fact that it is a threat to this

nation's security are, therefore, no more subject to litigation in a particular proceeding under the Act than would be, for example, the fact that much of the world was at war between 1941 and 1945, or that the nation and the world were suffering from severe economic dislocations in the early 1930's.³³ Cf. McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 313, 315-318. In short, these legisla-

³³ The latter example suggests a hypothetical analogy to the statute at bar. Suppose that Congress, during the depression of the '30's, passed an act which found as a fact, among other things, that there existed a world-wide economic depression, having certain described characteristics, which was severely affecting the nation's economy. Suppose further that the act established a regulatory agency with the power, under the guidance of appropriate standards, to prohibit or control certain types of business activity which were found on the basis of evidence to have a substantial tendency to deepen the world and national economic crisis by further depressing interstate and foreign commerce. Could a person or company liable to be affected by an order of such an agency demand the right to seek to prove before it that there was no world-wide economic depression of the type described in the congressional findings? Or that, if there was, it was not affecting the domestic economy in the manner found by Congress? We submit that there is nothing in any valid concept of due process which could properly be construed to require that every person or company involved in a proceeding before such an agency be granted a hearing in which to attempt to convince it that these basic legislative findings of Congress were erroneous. This is so, we maintain, notwithstanding that the adjudicative findings of the agency would assume the facts incorporated in the legislative findings in precisely the same sense in which the adjudicative findings of the Board in this case assume the facts stated in the legislative findings of § 2 of the Act at bar.

tive findings in § 2 are "[t]he reasons for the exercise of power" by Congress. *Carlson v. Landon*, 342 U. S. 524, 535. And as this Court said with respect to these very findings, in *Galvan v. Press*, 347 U. S. 522, 529:

On the basis of extensive investigation Congress made many findings, including that in § 2 (1) of the [Subversive Activities Control] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

(iii) The fact that § 4 of the Communist Control Act of 1954 (see Pet. Br. 268-269) refers to petitioner by name as a "Communist-action" organization under the Subversive Activities Control Act (see Pet. Br. 59-60) does not aid petitioner's basic contention on this point. Since the Communist Control Act was passed long after the termination of these proceedings before the Board, it is evident that that Act's designation of petitioner by name could not have influenced the

Board's deliberations or otherwise affected the administrative proceedings. At most, it amounted to congressional approval of and concurrence in the Board's decision. And that decision, as we have pointed out (*supra*, pp. 123-126), was required to be based upon judicially reviewable proof that petitioner came within the § 3 (3) definition of a Communist-action organization.

(b) *The Act does not establish a Board which is "necessarily biased" against petitioner*

Related to the previous contention, is petitioner's further argument (Br. 53-56, 70-71) that "the Act violates due process by establishing a Board which is necessarily biased and has an interest in the event" (Br. 70) because to sustain its *raison d'être* it would have to find the Communist Party within the Act. What petitioner in effect is charging is that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office. This Court has refused to impute, on the theory of constructive bias, a dishonest or interested point of view to government employees sitting as jurors in cases to which the Government is a party (*Frazier v. United States*, 335 U. S. 497; *United States v. Wood*, 299 U. S. 123), including criminal prosecutions of admitted Communists

of high position. *Dennis v. United States*, 339 U. S. 162. There is no more reason to believe members of the Board would violate their oaths in a proceeding under this Act by determining to find petitioner registerable as a Communist-action organization, irrespective of the Act's definition of the term and regardless of what the evidence might show. This Court has said, "We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." *Fahey v. Mallonee*, 332 U. S. 245, 256; see also *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 700-703; *National Labor Relations Board v. Air Associates*, 121 F. 2d 586 (C. A. 2). This is especially true where full opportunity for judicial review is afforded by the Act. (see *Fahey v. Mallonee*, *supra*, 332 U. S. at 256; *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 594 (C. A. 7)), and even more particularly where, as here, the standard of review is the strict "preponderance of the evidence" standard (see Op. 49, R. 2126). A full and fair hearing was in fact afforded in this case, and the Board's findings (in the main) and conclusions were upheld by the Court of Appeals as sustained by the preponderance of the evidence. The court below is surely not subject to the charges made against the Board.

(c) *The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions*

Petitioner next contends (Br. 46-53, 64-69; Pet. 16-18, 51-54) that the Act "violates due process because it authorizes a determination that an organization is a Communist-action organization on the basis of irrational and vague criteria" (Pet. 51). The "criteria" referred to are the eight evidentiary matters or factors listed in § 13 (e), which the Act requires the Board to "take into consideration" in "determining whether any organization is a 'Communist-action organization'." *Supra*, p. 74.

(i) At the heart of petitioner's contention, vitiating it in all its ramifications, is its fundamentally erroneous view (see Br. 46, 47, 48, 50, 51, 64, 68) that the eight factors itemized in § 13 (e) are *tests* or *individual criteria* of whether a given organization is a Communist-action organization. Petitioner assumes that under § 13 (e) the Board has been authorized by Congress to find that an organization is a Communist-action organization if it meets any one of the eight "tests" listed in that subsection. This assumption, however, is clearly erroneous, and the error is basic. Congress provided no such collection of litmus tests as petitioner supposes. The items listed in § 13 (e) are simply relevant considerations or guides to the consideration of evidence bearing

upon the question of whether an organization is a Communist-action organization. The sole and exclusive "test", which petitioner concedes to be "definite and meaningful" (Br. 53), is that supplied by the definition of such an organization in § 3 (3), viz, whether it is substantially directed, dominated, or controlled by the foreign government or organization controlling the world Communist movement *and* operates primarily to advance the objectives of that movement as referred to in § 2.

As the court below aptly phrased it (Op. 43, R. 2120), § 13 (e) is merely a "catalog of some basic considerations" bearing on that ultimate issue, and the listed items are in no sense exclusive. "Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material" (Op. 42, R. 2119).³⁴ On the other hand, if petitioner were right in its reading of the items in § 13 (e), the definition in § 3 (3) would serve no purpose at all.

³⁴ In this respect, the Act is comparable to many other federal statutes which set forth guides to administrators, guides which are not separate "tests" but factors to be considered. See, e. g., *Hampton & Co. v. United States*, 276 U. S. 394; *Mulford v. Smith*, 307 U. S. 38; *Sun-hine Coal Co. v. Adkins*, 310 U. S. 381; *Opp Cotton Mills v. Administrator*, 312 U. S. 126; *Yakus v. United States*, 321 U. S. 414; *American Power Co. v. Securities and Exchange Commission*, 329 U. S. 90; *Fahey v. Mallonee*, 332 U. S. 245; *Lichter v. United States*, 334 U. S. 742. See also *infra*, pp. 150-154.

(ii) When the function to be served by the § 13 (e) evidentiary factors is properly understood, they are not, as petitioner contends, "irrational" (Br. 46, 64). On the contrary, they are all both rational and probative. While we believe this to be evident from a mere reading of the items, we shall take them up *seriatim* and examine each in the light of the particular criticism leveled by petitioner. But in the course of this necessarily painstaking analysis we should not like the Court to forget that petitioner, by hacking away at the individual trees and ignoring the forest, has reached the astounding conclusion that it is impossible rationally to conclude that the Communist Party of the United States is the pawn of the Soviet Union and exists to further the objectives of the world Communist movement. In the guise of an elaborate textual argument, petitioner is simply denying that reasonable men can characterize it as has been done many times by all three branches of our government, by countless scholars throughout the world, by a multitude of foreign states, and by most of the press of the free nations.

The "directives and policies" consideration (§ 13 (e) (1)).—Section 13 (e) (1) requires the Board to take into consideration—

(1) the extent to which its [the organization's] policies are formulated and carried out and its activities performed, pursuant

to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 * * *.

This goes directly to the nature of the relationship existing between the organization and the foreign government or organization controlling the world Communist movement, which is the primary focus of the Act. Petitioner contends, however, that it is irrational on two counts.

First, it says, § 13 (e) (1) does not require the Board to consider whether the organization seeks to effectuate "the seditious objectives ascribed to the world Communist movement and the Soviet Union by section 2", but only whether it seeks to effectuate "any policies of the Soviet Union, irrespective of their content" (Br. 47, including fn. 19). Accordingly, says petitioner, the Board is authorized by § 13 (e) (1) to find that the domestic organization is a Communist-action organization "from the fact that the alleged agent advances objectives which are not peculiar to the alleged principal, but which may be shared by, and may benefit, non-Communist individuals and governments, including our own" (Br. 47).

This argument distorts the language of § 13 (e) (1). Section 13 (e) (1) does not say that the

Board is to consider the extent to which the organization's policies are formulated and carried out, and its activities performed, to effectuate "any" policies of the foreign government which controls the world Communist movement. The word used is "the," which refers to the policies of the foreign government as a whole. These would certainly include at least those major objectives referred to in § 2 as presenting a clear and present danger to the security of the United States, *i. e.*, the establishment of Communist totalitarian dictatorships in the countries throughout the world and the forcible overthrow of this Government (see, particularly, § 2 (1) and (15)), as well as any "good" objectives—objectives which might "be shared by" and "benefit" the United States—which could incidentally, as tactical or intermediate ends, accompany the major goals. As the court below remarked (Op. 44, R. 2121)—

The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our Government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of "evil" [*i. e.*, having "immediate objectives" which are "morally wrong" (see *ibid.*)] or even if it has many beneficent features.

Thus, contrary to petitioner's claim (Br. 68), § 13 (e) (1), fairly read, does direct the Board to consider evidence that the accused organization is engaged in promoting the disestablishment of our system of government. Furthermore, as we have pointed out (*supra*, pp. 123-125), the Board must in any event be satisfied from all the evidence that the organization before it, besides being controlled by the foreign government or organization controlling the world Communist movement, operates primarily to advance the objectives of that movement "as referred to in section 2." The objectives of the world Communist movement "as referred to in section 2" are precisely those objectives which petitioner contends, erroneously, are not required to be considered.³⁵

³⁵ Throughout its brief, petitioner repeats a statement to the effect that the court below held that "while section 3 (3) defines a Communist-action organization as one which promotes the seditious objectives attributed to the world Communist movement by section 2, section 13 (e) authorizes the Board to issue a registration order without any proof whatsoever that the accused organization promotes these objectives" (Br. 66; see also Br. 46, 47, 99, 101, 109, 113 [fn. 56], 115). The pages of the court's opinion which petitioner cites for this statement—Op. 41, 44, 45, R. 2118, 2121, 2122 (see Br. 46)—do not bear it out. What the court said was that the objectives referred to in § 13 (e) (1) "need not necessarily be 'evil' in [the] sense" of "*immediate objectives which are morally wrong*" (Op. 44, R. 2121, emphasis supplied)—which was what the court assumed petitioner meant by the word "evil" in the argument the court was then considering. The court did not say and could not have meant

Secondly, says petitioner, under the § 3 (3) definition "the two elements of a Communist-action organization"—foreign control and the fact that the organization operates primarily to advance the objectives of the world Communist movement—are stated "in the conjunctive", but § 13 (e) (1) refers to these elements "in the disjunctive. * * * This is plainly irrational" (Br. 47). Here, again, petitioner mistakes the function of § 13 (e) (1) as an alternative definition of a Communist-action organization. We have pointed out (*supra*, pp. 123-125) that only § 3 (3) contains the definition of such an organization. It alone controls the ultimate finding as to registerability. But this does not detract from the significance of § 13 (e) (1), which refers to evidentiary consid-

to imply that the Board would be authorized under the Act to find a domestic group a Communist-action organization without any proof that it promotes the objectives attributed to the world Communist movement by § 2. This is clear from its statement, among others, that "[o]ur Government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such dictatorship does not meet the definition of 'evil' * * *" (*ibid.*)—i. e., "evil" in the sense in which the court had just previously used the term.

Since the § 3 (3) definition requires a finding that an organization, to be a Communist-action organization, operates primarily to advance the objectives of the world Communist movement "as referred to in section 2", the evidence must establish that fact to support *supra* finding, but whether those objectives be deemed by any particular individual to be "good" or "evil" in the "moral sense" is not controlling.

erations having a direct bearing upon that issue and which are thus possessed of probative force.

The "non-deviation" consideration (§ 13 (e) (2)).—Section 13 (e) (2) requires the Board to take into consideration—

(2) the extent to which its [the organization's] views and policies do not deviate from those of such foreign government or foreign organization [*i. e.*, the foreign government or organization which controls the world Communist movement].

The court below not only held that the "non-deviation" inquiry is a proper one to be made in determining the question of foreign control, but observed that it would be "difficult to conceive of a more proper" one (Op. 44, R. 2121). "In an inquiry as to the domination of one organization by another," said the court, "the extent of the deviation one from the other in views and policies is both relevant and material; indeed it would be one of the necessary considerations" (*ibid.*). Non-deviation, in short, may not be conclusive, but it is plainly relevant.

Petitioner mistakes the meaning and purpose of this factor when it contends that "[u]nder this obscurantist text, the stigma of foreign control and sedition can be avoided only by adopting views which are demonstrably false if the Soviet Union has adopted views which are demonstrably true" (Br. 48). The fact that a local organiza-

tion mirrors in each facet of its activities through the years the policies of a foreign state is surely pertinent to proof of its control by that state. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 401. That B undeviatingly reflects A's every act does not, of itself, prove that A controls B; the possibility remains that B controls A, or that each is controlled by C, or that it is simply a matter of extraordinary coincidence. But the fact is certainly relevant to the inquiry. Cf. *North American Co. v. Securities and Exchange Commission*, 327 U. S. 686, 692, where this Court observed that, in determining whether one company was subject to the controlling influence of another, the Securities and Exchange Commission was "warranted in considering the harmonization of local policies."

The "financial aid" consideration (§ 13 (e) (3)).—Section 13 (e) (3) requires the Board to take into consideration—

(3) the extent to which it [the organization] receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization [*i. e.*, the foreign government or organization which controls the world Communist movement].

Petitioner attacks this evidentiary factor on the ground that foreign financial aid to a local organization does not, *in and of itself*, prove domination and control (Br. 49, emphasis added). Of course it does not. But foreign financial support

is a pertinent factor which may reasonably be considered with other evidence as tending to show control, by the foreign donor. In the ordinary course of events a foreign power does not contribute funds to a local organization as a bare gratuity, without expectation of some benefit.

Petitioner argues that in such cases "the relevant consideration is not the bare fact of aid, but the terms and conditions, if any, on which it is given" (*ibid.*). But as observed by the court below, while "the terms of a contribution are more, even much more, material to the issue of intended influence by means of the gift," nevertheless "the bare fact of the gift is not irrelevant" (Op. 46, R. 2123). While "it may be explained away, as may any of the statutory specifications of considerations" listed in § 13 (e), "the fact of the gift is certainly an admissible item of proof" (*ibid.*).

The "instruction and training" consideration (§ 13 (e) (4)).—Section 13 (e) (4) requires the Board to take into consideration—

(4) the extent to which it [the organization] sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement.

Petitioner's attack on this "test" (Br. 49-50) is another instance of its erroneous treatment of

each paragraph under § 13 (e) as supplying a criterion which may, in and of itself, be ultimate. But viewed as a factor to be weighed, this consideration is surely pertinent. True, the sending of one representative to one foreign conference might have little or no meaning. On the other hand, a local organization's continuous course of regularly sending representatives for specialized training in the strategy and tactics of world Communism, which is subsequently used for carrying out directions in this country, could be highly significant. Petitioner nevertheless contends that this factor "is irrational because it does not require a showing that the accused organization is obliged to or does conform to what is taught" (Br. 50). However, as remarked by the court below, the question at this point is not whether the Board could legitimately "make an ultimate finding of foreign domination upon the basis of bare evidence that [petitioner] sent agents abroad" (Op. 46, R. 2123), but the propriety of considering such evidence as part of a total picture.

The "reporting" consideration (§ 13 (e) (5)).—Section 13 (e) (5) requires the Board to take into consideration—

(5) the extent to which it [the organization] reports to such foreign government or foreign organization [*i. e.*, the foreign government or organization which controls the world Communist movement] or to its representatives.

Here, too, it is the context in which the reporting is done—the entire factual background against which the reporting occurs—which gives meaning and significance to the act of making reports. A report may be made, as petitioner says (Br. 50), under circumstances which suggest nothing in the way of control or domination. On the other hand, such surrounding circumstances as the length of time the reporting goes on, the frequency of its occurrence, the conditions of secrecy under which it is carried out, the contents of the reports, the reasons therefor, and all the other background data might very well indicate a definite degree of domination and control, or even that the reporting party is an agent of the party reported to. The fact of reporting is consequently a legitimate evidentiary item whose significance is to be appraised in the light of the evidence as a whole.

The “discipline” consideration (§ 13 (e) (6)).—Section 13 (e) (6) requires the Board to take into consideration—

- (6) the extent to which its [the organization's] principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization [i. e., the foreign government or organization which controls the world Communist movement] or its representatives.

If, as in the hypothetical case petitioner poses (Br. 50), the evidence should show that only a

relatively few of the organization's leaders or an unimportant minority of its members are subject to foreign disciplinary power, that fact would, of course, tend to discount the significance of this factor in the total picture which emerges from the evidence as a whole. But the possibility of that result does not negate the propriety of the inquiry, which is into "the *extent* to which" the organization's leaders and members are under foreign discipline. As with all the other evidentiary matters contained in § 13 (e), it is the *degree* to which the particular evidential factor appertains that the Board is directed to consider. If the evidence is equivocal or insignificant with respect to a given item of inquiry, the record will so show. It cannot be assumed in advance that the Board will be governed by trivial evidence or evidence having no real probative force with respect to the ultimate issue, or that Congress so intended.

The "secret practices" consideration (§ 13 (e) (7)).—Section 13 (e) (7) requires the Board to take into consideration—

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it [the organization] fails to disclose, or resists efforts to obtain information as to its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method);

(ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis. ○

Petitioner contends that this "test" is irrational because it makes "secret practices" relevant (Br. 51)—

* * * only if employed for the purpose of concealing foreign control or promoting the organization's objectives. The first of these purpose limitations involves circular reasoning, since foreign control is one of the ultimate facts to be established under section 3 (3). Obviously, a standard whose application requires proof of an ultimate fact cannot be used to determine the existence of the ultimate fact. * * *

This argument, however, overlooks the fact that the "purpose" clause of § 13 (e) (7) is not limited to "for the purpose of concealing foreign direction, domination or control." It is cast in the disjunctive: "* * * or of expediting or promoting its [the organization's] objectives." Thus, so far as the language of § 13 (e) (7) is concerned, the purpose of the secret practices may not be directly concerned with "concealing foreign direction, domination, or control." Petitioner's contention that § 13 (e) (7) necessarily

involves circular reasoning is therefore untenable.³⁶

Once again we must stress—because petitioner pointedly ignores it—that this is but one of several factors to be taken into account and is not determinative in itself. An organization's habit of operating on a basis of secrecy, for either of the purposes referred to in § 13 (e) (7), is obviously a pertinent factor to be considered in determining whether it meets the § 3 (3) definition of a Communist-action organization, along with such evidence as the calculated avoidance of previous registration acts, past illegal activities of its leaders, and past domination and control by a foreign government. Cf. *American Power Co. v. Securities and Exchange Commission*, 329 U. S. 90, 104.

³⁶ Petitioner also attempts to build a "circuitry" argument on the second part of the "purpose" clause of § 13 (e) (7), viz., "for the purpose of * * * expediting or promoting its objectives." Relating this to the second element of the definition of a Communist-action organization—the requirement that the organization in question "operate primarily to advance the objectives of such world Communist movement * * *" (see § 3 (3))—petitioner, in the same manner as it argued in the passage quoted in the text, *supra*, contends that the secrecy test cannot come into play until the ultimate fact that "secret practices" is supposed to establish has first been independently proved (Br. 51). This branch of petitioner's argument, however, is as invalid as the other, and for the same reason—that the two parts of the "purpose" clause of § 13 (e) (7) are in the disjunctive.

The "allegiance" consideration (§ 13 (e) (8)).—Section 13 (e) (8) requires the Board to take into consideration—

(8) the extent to which its [the organization's] principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization [*i. e.*, the foreign government or organization which controls the world Communist movement].

Petitioner criticizes this "test" on several grounds (Br. 51-52). First, it says, it is "completely subjective. It directs an inquiry into a pure state of mind" (Br. 51). Of course, allegiance is ultimately a matter of mental attitude. But this is determinable from objective facts. Inquiry into states of mind—with what intent a person did something, for example—is a common legal function.

Secondly, says petitioner, the paragraph in question "assumes the facts prerequisite to the state of mind into which the Board is to inquire" (Br. 51). It does not, according to the argument, direct the Board to determine *whether* any of the organization's leaders or members owe obligations to the foreign government or organization but assumes that some leaders and members do owe such obligations and confines the Board's inquiry

to whether they consider those obligations subordinate to their allegiance to the United States (Br. 51-52). This argument is little more than a quibble. — It could as well be argued that the paragraph assumes—what might be contrary to the facts—that all of the leaders and members of the organization consider that they owe at least some degree of allegiance to the United States. Properly construed, the paragraph simply means that the Board should take into consideration the extent to which the organization's principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to such obligations as they *may* have or feel they have to the foreign government or organization which controls the world Communist movement.

Thirdly, petitioner urges that the paragraph "imputes to the organization the state of mind of its 'principal leaders or a substantial number of its members' although they may be an unrepresentative or dissenting minority and though the organization itself is completely loyal" (Br. 52). This criticism is equally unavailing. It is the same attack which petitioner makes against the "discipline" consideration of § 13 (e) (6) (see *supra*, pp. 143-144) and our reply to that criticism (*supra*, pp. 143-144) is also applicable here. The essential point, once again, is that this factor, like all the other factors listed in § 13 (e), presents

a pertinent evidentiary consideration and is in no sense a controlling criterion.

The "allegiance" consideration, far from being irrational, is one of the most relevant and cogent factors. The character of an organization is always colored by the viewpoint of its leadership. When that viewpoint is shared by substantial segments of its other members, it may very well stamp the organization with an indelible character. If a significant number of the leaders and members of a certain group feel they owe a higher allegiance to a foreign country (or to an organization or movement controlled by that country) than to their own, that fact is incontestably one indication of the group's character. This factor becomes even more obviously relevant when applied to an autocratic organization dominated and inflexibly disciplined by a central ruling clique from the top down.

If the leaders and significant numbers of the membership pay fealty to the foreign government or organization over the years while manifesting hostility to every move of their own government; if they heap praise on the foreign government while consistently castigating their own; if internally they reflect as a group the thinking and the attitude of that foreign government to the point of actual identity while disassociating themselves from that of their homeland—such evidence is a legitimate and potent factor, to be

evaluated in the light of all the other evidence, in determining the ultimate issue presented by § 3 (3).³⁷

(iii) After attacking each of the considerations separately, petitioner further contends (Br. 52-53, 68-69) that § 13 (e) is invalid, as a whole, because it is so vague that decision is left to the Board's unfettered discretion. Pointing out that the subsection directs the Board to take into consideration eight "standards" in determining whether an organization is a Communist-action organization, petitioner argues that "[t]he Act nowhere indicates whether a registration order must be supported by adverse findings under all eight standards, or whether something less is sufficient" (Br. 52). Furthermore, it is argued, "[t]he obscurity which thus envelops section 13 (e) is made even more impenetrable by the phrase 'the extent to which,' which prefaces each of the eight standards" (Br. 52-53).

³⁷ Related to and overlapping petitioner's argument that the considerations listed in § 13 (e) are irrational is its argument (Br. 64-65) that the subsection is based upon "arbitrary and unreasonable" "presumptions", which are "conclusive" (Br. 65). As our discussion of the eight considerations shows (*supra*, pp. 134-150), they are plainly not "presumptions" of any kind, *prima facie* or conclusive, but factors to be weighed—akin to the many similar lists in other federal legislation providing for administrative rulings—and they are certainly not unreasonable.

This is precisely the attack which has been made, time and time again, on delegations of authority by Congress to an administrative or executive agent, and the answers which the Court has given in the past suffice to destroy the present complaint. To begin with, the fact that the Board's findings of fact are subject to judicial review, and are conclusive only if supported by the preponderance of the evidence (§ 14 (a)), in itself refutes the suggestion that the Board has any "unfettered" discretion in its fact-finding function. *Carlson v. Landon*, 342 U. S. 524, 543.³⁸ But, beyond that, the only "test" by which the validity of the Act must be judged is the ultimate standard of § 3 (3), containing the definition of a Communist-action organization. The Act can be invalid for reasons of vagueness only if this ultimate standard is not "* * *" sufficiently precise for an intelligent determination of the ultimate questions of fact by experts." *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 400. Significantly, petitioner does not challenge the definition on the score of vagueness, but acknowledges that "the ultimate standards established by

³⁸ In the *Carlson* case, this Court observed that "In carrying out that policy [*i. e.*, as to the deportation of aliens] the Attorney General is not left with untrammelled discretion as to bail. Courts review his determination. * * *" (342 U. S. at 543).

section 3 (3) are definite and meaningful" (Br. 53).

This sufficiency is not diluted by the fact that Congress, in addition to formulating the final criterion, directed the Board to "take into consideration" "the extent to which" certain factors "were true with respect to a given organization in determining whether it came within § 3 (3): Congress did not tell the Board, as petitioner apparently suggests it should have, what relative weight it should give to each of the factors mentioned, or advise it as to what "extent" each factor should be present to have significance or how much significance it should have. But no such attempt to affix apothecaries' weights to abstract concepts would have been possible even if desirable. The Constitution "is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 145. This Court's decisions deny that there is any defect in Congress' directive to the Board to "take into consideration" "the extent to which" the factors mentioned are true or applicable in a given case.

In *Hampton & Co. v. United States*, 276 U. S. 394, the Court upheld a congressional direction to the President, in adjusting tariffs, to "take into consideration," "in so far as he finds it practicable," a variety of economic matters—includ-

ing the catch-all "any other advantages or disadvantages in competition" (276 U. S. at 401-402). In *Mulford v. Smith*, 307 U. S. 38, 48-49, the direction in the Agricultural Adjustment Act of 1938 to the Secretary of Agriculture that, in allotting marketing quotas among states and producers, he give "due consideration" to a variety of economic factors (307 U. S. at 43) was sustained. *Opp Cotton Mills v. Administrator*, *supra*, 312 U. S. 126, 142-146, upheld the requirement in the Fair Labor Standards Act of 1938 that, in fixing minimum wage rates, the Wages and Hours Administrator "consider among other relevant factors" certain itemized economic considerations (312 U. S. at 136). And in *Yakus v. United States*, 321 U. S. 414, 423-427, the Court sustained the directive to the Price Administrator, in establishing maximum prices on commodities, to "ascertain and give due consideration to," "so far as practicable", prices prevailing during a designated base period, and to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including" certain specified economic factors (321 U. S. at 421).³⁰

The *Opp Cotton Mills* case, *supra*, is particularly pertinent. "It is urged," said the Court,

³⁰ See also: *American Power Co. v. Securities and Exchange Commission*, 329 U. S. 90, 104-106; *Bowles v. Willingham*, 321 U. S. 503, 512-516; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 397-399; *Field v. Clark*, 143 U. S. 649, 680-694.

"that the statute does not prescribe the relative weight to be given to the specified factors or the other unnamed 'relevant factors.' It is said that this * * * leave[s] the function which the committee and Administrator are to perform so vague and indefinite as to be practically without any Congressional guide or control" (312 U. S. 143-144). Rejecting this argument, the Court said (at 145-146):

* * * The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based.

The same point was expressed in *Bowles v. Willingham*, 321 U. S. 503, 516.⁴⁰

⁴⁰ " * * * The fact that there is a zone for the exercise of discretion by the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts."

(d) *The Communist Control Act of 1954 does not make it impossible for petitioner to know who its members are.*

Petitioner's next challenge to the registration provisions as violative of due process is based on its reading of those provisions in the light of § 5 of the Communist Control Act of 1954, c. 886, 68 Stat. 776 (Br. 29, 75-82). The argument runs as follows: If the order of the Board becomes final, petitioner (and its officers will be required to list the names of all its members in its registration statement, and "other persons" will have to "determine whether they are members" in order to know whether they are subject to the Act's sanctions and whether they must personally register in the event of petitioner's default (Br. 75). Section 5 of the Communist Control Act, continues the argument, sets forth certain "criteria for determining membership" in petitioner, so that petitioner's officers "must apply" these "criteria," as must also the "other persons" (Br. 75-76). But § 5 of the Communist Control Act establishes such "vague and irrational criteria" of membership in petitioner, the argument concludes, that it is impossible for any one to know whether or not anybody, including himself, is a member, with the alleged consequence that the registration requirements of the Act, consid-

ered in the light of § 5 of the Communist Control Act, are void for indefiniteness (Br. 76)."

(i) For reasons similar to those set forth *supra*, pp. 102-104, 121-123, this contention is premature since the stage of preparing and filing a registration statement has not yet been reached, and the Board's findings and order are valid even though some of the officers of petitioner who will have the duty to effect its registration may have good reasons for not complying with the order, or not complying fully.

"Section 5 provides that—

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, *the jury, under instructions from the court*, shall consider evidence, if presented, as to whether the *accused person*: * * * [Emphasis added.]

This is followed by thirteen numbered paragraphs, of which it will suffice here to quote the first few as examples:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

* * * * *

A fourteenth and final paragraph provides:

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

(ii) In any event, the argument is unsound. As with the considerations set forth in § 13 (e) (*supra*, pp. 132-154), petitioner erroneously attempts to depict § 5 of the Communist Control Act as a collection of "tests" of membership, any one of which would suffice. But the language of § 5 makes it absolutely clear that its purpose is merely to list items of evidence to be considered in reaching the ultimate factual conclusion of knowing membership. It states that in determining membership, etc., the jury "shall consider evidence * * * as to whether * * *," etc. And subsection (14) provides that the enumeration of the "above subjects of evidence" shall not limit the inquiry into and consideration of "any other subject of evidence" on membership, etc. See fn. 41, *supra*, p. 156. Each of the evidentiary items listed is plainly a relevant consideration even though it may not be determinative. The whole section makes sense when it is realized that the Communist Party, as the evidence before the Board showed (see R. 105-106 [1994-1995]; see also *United States v. Hiss*, 185 F. 2d 822, 824, 829 (C. A. 2), certiorari denied, 340 U. S. 948), has traditionally had two broad types or classes of members—"open" members, who hold themselves out to the public as such and make no attempt to conceal their membership, and "secret" or "underground" members, whose membership

for various reasons is known only to a select few in the organization.

Petitioner's elaborate attempt (Br. 77-82) to depict § 5 as a trap for the unwary—as a snare for catching as members persons who do not know they are members—disregards the nature of the items as non-exclusive evidentiary factors and particularly ignores the provision that the jury's consideration of the types of evidence listed be “under instructions from the court.” It is to be presumed that the court's guidance of the jury in its consideration of such evidence will be an intelligent guidance. Petitioner's suggestion that the only way in which a person of prudence can under § 5 avoid the risk of being found to be a member of it is to “shun association or communication with all men” and “live the life of a hermit” (Br. 82) is certainly incompatible with that premise.

(iii) Moreover, the language of § 5 shows that the section has no application to or connection with petitioner's duty under the Subversive Activities Control Act to file a registration statement (when the order to register becomes final) listing its members, or to possible criminal proceedings against it or its officers for willfully omitting the names of any of its members in such a registration statement. The fact that § 5 is exclusively concerned with jury trials shows that it has no reference to the administrative process

of filing a registration statement with the Attorney General. And the fact that it relates to jury trials in which the "accused person" (see fn. 41, *supra*, p. 156) is one who denies either his membership in the Party or his knowledge of the purpose or objective of the Party shows that it has no relation to possible criminal proceedings against the Party or its officers for willfully omitting the names of any of its members in the registration statement.⁴²

Section 5 of the Communist Control Act might apply to criminal prosecutions brought under § 15 (a) (2) of the Subversive Activities Control Act against individual members who fail to register as required in those limited situations (defined in § 8) in which individual members are

⁴² Section 15 (a) (1) of the Subversive Activities Control Act provides for the punishment of the "organization" if, having been finally ordered to register, it fails to register or to file a registration statement or annual report or to keep records as required. This is the only criminal provision connected with the registration process which is applicable to organizations as such. Section 15 (b) provides for the punishment of "[a]ny individual" who, in a registration statement, willfully makes any false statement or willfully omits to state any fact required to be stated. Paragraph (2) of § 15 (b) provides that each listing of the name or address of any one individual in a registration statement shall be deemed a separate statement. The "individuals" required to file registration statements on an organization's behalf, should the organization itself fail to do so, are certain designated officers of the organization (§ 7 (h); 28 C. F. R. § 11.205; see *supra*, pp. 75-76, including fn. 18).

required after Board proceedings to register personally (see *supra*, pp. 76-77). But, as we have pointed out, it has no connection with criminal proceedings for failure, either by petitioner or by its officers, to file a full and true registration statement listing all members.

(e) *The validity of the provision making each day of failure to register a separate offense is not presented, and in any case it is valid*

Petitioner points out that an "astronomical accumulation" of penalties is made theoretically possible by the provision of § 15 (a) whereby each day of failure to register, once the obligation to do so arises, is declared to constitute a separate offense (Br. 28, 32-33).

(i) This contention, too, is prematurely raised in this proceeding. The penalty may never be applied to petitioner, and the issue may therefore never be reached. See *United States v. Harris*, 347 U. S. 612, 626-627.

(ii) On its merits, the point must be rejected. It is clear, in the first place, that there cannot be any such accumulation of penalties unless an organization which has been finally ordered to register chooses to incur them by continued deliberate non-compliance. An organization is not required under the Act to disobey a final order to test its validity. Cf. *Gulf, Colorado & Santa*

Fe Ry. Co. v. Texas, 246 U. S. 58, 62; *Ex parte Young*, 209 U. S. 123, 145-148. The duty to register arises only after the validity of the registration requirements has been judicially determined and a final order has resulted. See *supra*, p. 79. Thus, penal liability results only from willful refusal to comply with a requirement laid down by Congress, implemented by a Board order after formal hearings, and upheld by the courts.

It is settled, moreover, that the extent of the permissible punishment imposable under an otherwise valid statute is, subject only to the Eighth Amendment's prohibition against cruel and unusual punishments, a matter of exclusive legislative discretion. *Blockburger v. United States*, 284 U. S. 299, 305. Congress was no doubt aware that effective enforcement of registration and reporting requirements is difficult where continuing disobedience can result in but a single penalty, which might be considered *de minimis* by a large organization. And it does not follow that because a court might, in a particular case, inflict punishment in an unreasonably harsh manner that the statutory clause under which the punishment is inflicted is completely invalid. It is easy to see, for example, that the law making a separate offense of each mailing in furtherance of a fraudulent scheme could in certain cases be enforced in a confiscatory manner. But the con-

stitutionality of the statute itself is settled. *Badders v. United States*, 240 U. S. 391, 394; cf. *Marcus v. Hess*, 317 U. S. 537, 552; *Blockburger v. United States*, 284 U. S. 299; *Ebeling v. Morgan*, 237 U. S. 625.

B. THE SO-CALLED "SANCTION" PROVISIONS OF THE ACT
ARE VALID

Introduction.—Immediately upon the registration of an organization under the Act, or when an order of the Board requiring an organization to register becomes final (after judicial review), certain legal consequences automatically occur. These consequences are, generally speaking, in the nature of legal disabilities or restrictions. They are broadly classifiable into two types—those affecting the organization as such, and those affecting members of the organization. They have come to be known in this litigation as "sanctions" (see Op. 5, R. 2082). Briefly, they may be identified as the "labeling," "tax," "contributions," "employment," "passport," and "alien" provisions, the first three being applicable to organizations as entities, and the last three to individual members of the organizations affected. See *supra* pp. 79–84; *infra*, pp. 165–201.

These sanctions are to be distinguished from the Act's criminal penalties. In addition to the criminal penalties imposed both on organizations and individuals for various offenses connected

with the registration process (see *supra*, pp. 84-85), the Act imposes other penalties on individuals for certain offenses connected with four of the general sanctions (the "labeling," "contributions," "employment," and "passport" provisions; see *supra*, pp. 85-86). But, while the sanctions become automatically operative upon an organization's registration or being finally ordered to register, a criminal penalty associated with a sanction can be enforced only in the usual manner in which criminal penalties are enforced, *i. e.*, by indictment, trial, and conviction.

Petitioner assails the sanctions of the Act on several different constitutional grounds. First, it attempts to show that the sanctions, considered together with the "public opprobrium" which results from a registration order (Br. 31); make the Act one of "outlawry" (Br. 26-33), and, as such, violative of the freedoms guaranteed by the First Amendment (Br. 90-107, 113-119, 173-174). Secondly, it contends that the sanction provisions violate due process (Br. 72-75). Finally, it argues that, by virtue of the sanctions, the Act is a bill of attainder, proscribed by Article I, § 9, clause 3 (Br. 60-64). For the reasons suggested above (*supra*, pp. 42, 88-89, 104, 113-114), the validity of none or only some of the sanctions may now be before the Court, but in view

of the Court of Appeals' treatment of this problem⁴³ and petitioner's extensive argument we discuss all of the sanctions.

1. *The sanction provisions do not violate the First Amendment*⁴⁴

We have previously shown (*supra*, pp. 89 ff.) that the Act's registration provisions, as such, are consonant with the guaranties of the First Amendment. In that connection, we discussed the gravity of the evil with which Congress was dealing in this Act as well as this Court's rulings showing that First Amendment protections are far from absolute. Against the same significant back-

⁴³ The "alien" and "tax" sanctions have no criminal penalties associated with them, but their validity could be tested in appropriate proceedings unconnected with the present one (*e. g.*, habeas corpus or declaratory judgment proceedings or proceedings in the Tax Court). Because the validity of all of the sanctions could be tested apart from the present proceeding, we argued in the court below that the court could properly limit its consideration to the validity of the registration provisions, and that no sanction was so functionally bound up with the registration provisions that it was required to be considered together with the registration provisions, in this proceeding, as part of a seamless web. The court below, however, rejected this contention and requested argument on the sanction provisions (*supra*, p. 11; Op. 4-7, R. 2081-2084) on the ground that the sanctions are "attachments" to registration and "[w]e cannot strip the registration of its attachments" (Op. 5, R. 2082).

⁴⁴ Since petitioner stresses the First Amendment, we include that provision of the Constitution in the heading for this sub-point, but to avoid needless duplication our discussion will also consider certain aspects of substantive due process related to the First Amendment issues.

ground, we now consider petitioner's related contention that the Act's sanctions are individually violative of the First Amendment (Br. 100-107) and that they confirm its contention that the Act as a whole, by in effect "outlawing" it (Br. 107), will have the practical effect of silencing it and its members as "effective" advocates of "lawful" political action, in alleged further violation of the First Amendment (Br. 91-100).

(a) Sanctions applicable to organizations as such

The sanctions which are applicable to organizations as entities are three—the "labeling," "tax," and "contributions" sanctions.

(i) The labeling requirements

When an organization is registered or has been finally ordered to register, each publication of the organization transmitted by mail or in interstate or foreign commerce and intended to be circulated among two or more persons is required to bear on its face and on any wrapper in which it is contained the statement "Disseminated by [name of organization], a Communist organization" (§ 10 (1)). Similarly, all radio and television broadcasts sponsored by the organization must be identified as being "sponsored by [name of organization], a Communist organization" (§ 10 (2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (§§ 10, 15 (c)).

These labeling requirements most nearly approach, of all the sanctions, the area of First Amendment rights. We contend nevertheless that, measured against the evil at which the Act strikes, they are well within the power of Congress to impose.

a. Labeling imposes no censorship on any mail matter or broadcast material; the content of either is immaterial. What the provisions do is not to censor the "speech," but to identify the "speaker." If such revelation interferes with the purposes of an organization by destroying its anonymity and disclosing its true nature, it is because of the unpopularity of the organization in the free market of ideas. The "restraints" are entirely social, not legal. Organizations subject to the requirement are at liberty to issue any literature or propaganda they choose, provided it is labeled and does not contain anything constituting a crime in itself, such as, for example, advocacy of the violent overthrow of the Government. Furthermore, the labeling requirements apply to organizations only. Individuals, including members of the organizations, are not subject to even the indirect restraint of labeling.

United States v. Harriss, 347 U. S. 612, 625-6, *Burroughs and Cannon v. United States*, 290 U. S. 534, 545, 548, and *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 312, 315-316, all teach that such disclosure and labeling requirements may validly

be imposed in order to serve a proper purpose. In *Harriss*, the Regulation of Lobbying Act was sustained because members of Congress have a right to know "who is being hired" to attempt to influence them, and "who is putting up the money". *Burroughs and Cannon* upheld the comparable provisions of the Corrupt Practices Act in order "to safeguard [a federal] election from the improper use of money to influence the result". The requirement that newspapers disclose their owners in order to enjoy second-class mail privileges was held valid in the *Lewis Publishing Co.* case. *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453, 462-463, upheld a requirement by the Labor Board that an employer found to have engaged in an unfair labor practice should post notices that it would "cease and desist" from like activity in the future. See, also, *Bryant v. Zimmerman*, 278 U. S. 63. None of these rulings is, of course, decisive here, but they do direct the inquiry to the aim and purpose of the particular labeling requirement. They also help to mark the bounds of the proper ends of disclosure.

b. What we have in this case is the Communist Party, foreign-controlled and engaged, among its other activities, in widespread propaganda which, whatever the immediate issue may happen to be, has always as its ultimate objective the domination, by force, of this country and the

world by the world Communist movement under the leadership of the Soviet Union. Much of this propaganda is covert, and all of it attempts to sell itself to the public as peacefully and lawfully inspired. The record shows that it is petitioner's standard policy to exploit situations of human misery and legitimate grievance for the temporary foothold its organizers thereby gain in social, racial, and labor groups. The Party frequently dons its mask of respectability and sympathy to plead for various causes which it thinks will advance its own falsely assumed status as a champion of human rights (cf. Br. 92). "Basic to those techniques [of Communism] is the element of disguise. Over and over, the Communist creed poses under a thousand masks—a thousand fronts—organizations—movements—drives—with glittering, alluring appeal to snare the unwary."⁴⁵ But the ultimate objective remains steadfast and unvaried.

In theory, perhaps, if every one had the time and talent to be able to make an independent evaluation, after sufficient research, of the truth or soundness of each political utterance with which he is propagandized in the mails and over the air waves, he would have no need to know from what source the propaganda came. "But as a practical matter", as it has been cogently observed, "this independent determination

⁴⁵ *Internal Security Manual Revised*, S. Doc. No. 40, 84th Cong., 1st sess., p. 2 (Introduction to the original edition by Senator Alexander Wiley).

is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate" (Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L. Q. 182, 208). And nowhere is the need for disclosure of the true source of propaganda more pressing than in the case of a Communist-action organization. "In light of the Soviet allegiance of American communists, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, a requirement of disclosure would seem to be justified. This disclosure would greatly diminish their influence, not because of government suppression, but rather because of public recognition of their interests. Although it is true that some methods of achieving disclosure may infringe upon freedom of expression, the objective of putting the spotlight on communist propaganda does not limit that liberty, but adds to the relevant facts in the market-place of competing ideas" (*id.* at 208-209).

As the court below remarked, "surely the people are entitled to know when an organization which falls within the definition of a Communist-action organization in this statute is addressing them over the air" (Op. 36, R. 2113). This observation is no less true with respect to the circularization of propaganda by mail. To para-

phrase the words of Mr. Justice Black, with whom Mr. Justice Douglas concurred, dissenting in *Viereck v. United States*, 318 U. S. 236, 251 (said in their context with reference to the Foreign Agents Registration Act):

Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the [Act] is intended to label information [emanating from a Communist source] so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

Moreover, the petitioner calls itself the "Communist Party." There "seems little to choose" so far as petitioner is concerned, between being identified as "The Communist Party" and as "The Communist Party, a Communist organization," which is what the Act requires. See Op. 35-36, R. 2112-2113. It is no answer for petitioner to say that the requirement that it identify itself not only by name but as "a Communist organization" brands it "invidiously" and "discriminatorily" (Br. 106-107) in the eyes of the public. Nor is it an answer to complain that "other political parties" (Br. 93) are not subject to special labeling requirements. An organ-

ization subject to the labeling requirements of this Act is one that has been found, after a full hearing (including judicial review), to be the puppet of a foreign power, working to achieve the ends of that power—ends which encompass the extension of its totalitarian hegemony over this nation “by any available means, including force if necessary” (§ 2 (6)). Cf. *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453; *Bryant v. Zimmerman*, 278 U. S. 63.

The fundamentally erroneous premise which runs all through petitioner's First Amendment argument is that it is just another political party, expressing ideas in the political arena. It complains that the Act attempts to proscribe for “certain groups”, such as Communists, “activities that are perfectly proper for everyone else” (Br. 93). But petitioner is not “just another political party” (cf. Mr. Justice Jackson, concurring in *Dennis v. United States*, 341 U. S. 494, 566, and in *American Communications Assn. v. Douds*, 339 U. S. 382, 422–433), as the evidence in this case, so overwhelmingly proved. See *supra*, p. 9; *infra*, pp. 209–261. When an agency of the world Communist movement poses tactically as a benign domestic organization and champion of constitutional liberties, while concealing its ultimate strategy of foisting a communistic dictatorship on the nation in a Czechoslovakia-type coup as soon as it feels the time to be pro-

picious—i. e., when its leaders are in positions of sufficient power and the ranks of its lesser members have been sufficiently strengthened by the duped victims of its propaganda (cf. Mr. Justice Jackson, concurring in *Dennis v. United States*, 341 U. S. 494, 566)—we submit that Congress can act to defeat the strategy by compelling the truthful identification of the source of the propaganda, to the end that the people may not be deceived.

c. On the premise that Congress has power to keep the channels of interstate commerce and the postal system free from concealed propaganda of this type, there is abundant precedent for the labeling requirements, which are not aimed at private correspondence but at literature sent through the mails or in commerce with the intent that it be circulated publicly.

A 1912 statutory requirement provides that newspapers and magazines, to enjoy the privileges of second-class mail, must publicly disclose the names of their owners and plainly mark with the word "advertisement" all items which have been paid for (Act of August 24, 1912, c. 389, § 2, 37 Stat. 553; now 39 U. S. C. §§ 233, 234). Sustaining this law against the charge that it unconstitutionally abridged freedom of the press, this Court quoted with approval from the committee report on the bill, as follows (*Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 312, 315-316):

* * * It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that * * * it is not only equitable but highly desirable that the public should know the individuals who own or control them.

The purpose behind that statute—which this Court described as “secur[ing] to the public in ‘the dissemination of knowledge of current events,’ by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement” (229 U. S. at 315–316)—was held in no wise to constitute a forbidden invasion of freedom of the press. The pertinence of this decision seems clear. If Congress may condition the enjoyment of second-class mail privileges by publishers on their making full disclosure of the true interests represented by their publications, Congress may also require a Communist-action organization to label its publications, or else desist from distributing them by mail at all.

Similarly, the power of the Government to prevent the fraudulent use of its own mail facilities

is a broad one, and has long been established.* This power has been sustained against contentions that it is, in itself, violative of First Amendment and other constitutional rights. In *re Rapier*, 143 U. S. 110; *Horner v. United States*, 143 U. S. 207; *Public Clearing House v. Coyne*, 194 U. S. 497, 507; *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407. More recently, this Court has sustained the power in the follow-

* In 1872, Congress authorized the Postmaster General to forbid the payment of money orders and the delivery of registered letters to persons or companies found by him to be conducting an enterprise to obtain money by false pretenses through the use of the mails, and to return all such letters to their senders with the word "fraudulent" stamped on the envelope (Act of June 8, 1872, c. 335, § 300, 17 Stat. 322; now 39 U. S. C. §§ 259, 732). In the same statute, Congress made it a criminal offense to place any letter or package in the mails for the purpose of carrying out any scheme or artifice to defraud (*id.*, § 301, 17 Stat. 323; now 18 U. S. C. § 1341). In 1889, Congress declared all letters and other matter designed to perpetrate frauds to be "non-mailable" (Act of March 2, 1889, c. 393, § 4, 25 Stat. 874; now 39 U. S. C. § 256). In 1895, the Postmaster General's fraud-order powers were extended to cover all letters or other matter sent by mail (Act of March 2, 1895, c. 191, § 4, 28 Stat. 964; now 39 U. S. C. § 259). Other statutes, such as the Securities Act of 1933 (Act of May 27, 1933, c. 38, § 5, 48 Stat. 71, as amended by the Securities Exchange Act of 1934, c. 404, § 204, 48 Stat. 906; now 15 U. S. C. § 77e) and the Federal Trade Act of 1938 (Act of March 21, 1938, c. 49, § 4, 52 Stat. 114; now 15 U. S. C. §§ 52, 53), contain provisions similarly designed to rid the mails and the channels of commerce of false or fraudulent securities, advertising matter, and the like.

ing language (*Donaldson v. Read Magazine*, 333 U. S. 178, 190):

All of the foregoing statutes [mail fraud statutes], and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established.

Rejecting a contention that the First Amendment stood as a bar to congressional action designed to free the mails of fraudulent material, the Court added (333 U. S. at 191):

* * * None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

Congress has not, in this Act, attempted to exercise the same degree of control as it employs to prevent the usual type of mail fraud involving financial swindles. The literature-labeling provisions constitute a far milder form of sanction or control-measure, viz, compulsory identification. The provisions do not relate to the contents of any mail matter, however fraudulent they

may be, or however inflammatory. They simply identify the sender organization—which in petitioner's case has no unqualified right to conduct its affairs in secret (cf. *United States v. Morton Salt Co.*, 338 U. S. 632, 652)—with an identifying phrase found to be truthful after a full hearing.

The employment of reasonable identification devices to forestall public deception has other precedents. We have already mentioned (*supra*, pp. 172–173) the requirement that publishers who use second-class mail facilities identify their ownership (39 U. S. C. § 233) and mark paid items as advertisements (39 U. S. C. § 234). Cf. 39 U. S. C. §§ 255, 257. In addition, all political circulars and other statements relating to candidates running for federal office, which are deposited in the mails or in interstate commerce, must include the names of the persons or groups responsible for the publication in question, as well as the names of the officers of each such group (18 U. S. C. § 612). The Foreign Agents Registration Act contains rigorous labeling requirements applicable to the dissemination of political propaganda. See *supra*, pp. 93, 95, 98–99.⁴⁷ These instances—along with the others we have

⁴⁷ In addition, the Foreign Agents Registration Act goes much further than the Act at bar in another respect. It declares certain types of political propaganda to be entirely nonmailable at the discretion of the Postmaster General under certain circumstances (22 U. S. C. § 618 (d)).

cited—show that labeling and identification devices may be used where, as here, there is sufficient need and a proper purpose.

d. The identification requirements of § 10 pertaining to radio and television broadcasts are as valid as the literature-labeling requirements and for the same reasons. Indeed, the reasonableness of requiring accurate identification of speaker and sponsor in such mass media of communication as radio and television is even more apparent, since, because of the inherent limitations of those media, they are peculiarly subject to government control in the public interest. *National Broadcasting Co. v. United States*, 319 U. S. 190, 226-227; *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285; *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F. 2d 850, 851 (C. A. D. C.), certiorari denied, 288 U. S. 599. All paid broadcasts over any radio station have been required since 1934 to be identified and announced at the time of the broadcast as having been paid for by the person furnishing the money (Communications Act of 1934, c. 652, § 317, 48 Stat. 1089; 47 U. S. C. § 317). The Act at bar simply carries this principle one step further in the case of organizations finally ordered to register by requiring them to give the additional identifying words, "a Communist organization," a phrase which, as we have

shown, cannot be deemed unfairly stigmatizing or discriminatory, in view of the nature of the world Communist movement and petitioner's subordination to it.

(ii) *The tax provisions*

Section 11 (a) of the Act disallows the deduction for tax purposes of contributions to any organization which is registered or has been finally ordered to register as a Communist organization, and § 11 (b) denies to such an organization tax exemption under § 101 of the Internal Revenue Code (26 U. S. C. § 101).

Petitioner apparently does not seriously question the validity of these provisions, and, in any event, there can be no real doubt of the power of Congress to withdraw its legislative grace, for reasons of policy, in specific areas relating to taxation. That the conferring of tax-exempt status on an organization and permitting the deduction from gross income for tax purposes of sums contributed to such organization are matters of legislative grace is clear. *Helvering v. Ohio Leather Co.*, 317 U. S. 102, 106; *Helvering v. Northwest Steel Mills*, 311 U. S. 46, 49; *Cornell v. Coyne*, 192 U. S. 418, 431; *Rector of Christ Church v. County of Philadelphia*, 24 How. 300. These grants vest no permanent right in the favored class to continue its enjoyment of special treatment (*Choate v. Trapp*, 224 U. S. 665, 674;

Yazoo and Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 22) and may be withdrawn at will by legislative act. *Rector of Christ Church v. County of Philadelphia, supra*, 24 How. 300.

Federal tax-exemption and deductibility provisions are founded on the public interest in fostering, as a matter of policy, the types of activity pursued by the favored organizations (*Helvering v. Bliss*, 293 U. S. 144, 150-151), most of which enjoy that status because, by performing public services, they relieve the public *pro tanto* of a burden which otherwise would fall on it. *Trinidad v. Sagrada Orden*, 263 U. S. 578, 581. Since they thus constitute a form of subsidy to activities deemed by Congress to be beneficial to the public, Congress may withdraw its favor when it sees that a one-time beneficiary of its grace is engaged in activities thought to be inimical to the public interest. It would be strange if this Government were required to foster through special exemptions in its tax laws the activities of a domestic agency of a world-wide movement which is dedicated to its violent overthrow.

(iii) *The contributions prohibition*

A restriction which indirectly affects organizations required to register under the Act is the provision of § 5 (a) (2) (A) making it unlawful for any officer or employee of the United States or of any defense facility, with knowledge or

notice that an organization is registered or has been finally ordered to register, to contribute funds or services thereto. Violations are punishable by fine or imprisonment or both (§ 15 (c)).

We shall assume *arguendo* that the effect of this prohibition on petitioner is not so remote, despite the indirectness of the impact, as to deprive it of standing to challenge. Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 143, 150-160; *Pierce v. Society of Sisters*, 268 U. S. 510, 535-536; *Buchanan v. Warley*, 245 U. S. 60, 72-73; *Truax v. Raich*, 239 U. S. 33, 38-39; but see *Tileston v. Ullman*, 318 U. S. 44.

The forbidding of money contributions or other contributions of value by government and defense-facility employees to a Communist-action organization, as the term is defined in this Act, is a reasonable measure in relation to the problem which faced Congress and which led to the passage of the Act. If Congress can validly forbid employees of the United States to engage in partisan politics. (*United Public Workers v. Mitchell*, 330 U. S. 75), it can validly forbid them to contribute to the welfare of an organization found to have as one of its primary objectives the destruction of their employer at the earliest feasible opportunity and "by any available means,

including force if necessary" (§ 2 (6))." If the Government has power to safeguard itself by appropriate security and loyalty investigations of its employees (see the Presidential Loyalty and Security Orders, E. O. 9835 of March 21, 1947 (12 F. R. 1935), and E. O. 10450 of April 27, 1953 (18 F. R. 2489); and cf. *Peters v. Hobby*, 349 U. S. 331; *Bailey v. Richardson*, 182 F. 2d 46 (C. A. D. C.), affirmed by an equally divided Court, 341 U. S. 918), it has also the power to forbid its employees to contribute to the treasury of an organization dedicated to its forcible overthrow. Since the prohibition has prospective effect only, no employee can complain of it. If he insists on his right to make the prohibited contribution, he must quit the employment which Congress has declared to be incompatible with this particular type of political donation. See *Adler v. Board of Education*, 342 U. S. 485, 492.

The prohibition against the making of contributions to registered organizations by defense-facility employees, is, we submit, on no greatly different footing. The importance of keeping subversive elements out of the ranks of employees of defense facilities is no less pressing than in the case of employees of the Government itself. If Congress can validly provide that members of

* Membership in the Communist Party has long been forbidden, in effect, to Federal employees by the Hatch Act and riders to appropriation acts.

a registered Communist-action organization shall be ineligible for defense-facility employment, as we think it can (see *infra*, pp. 185-189), it can also forbid the employees of such facilities to support such an organization with money contributions.⁴⁰

(b) *Sanctions applicable to individual members of organizations ordered to register*

There are three general categories of sanctions applicable to individual members of organizations which have registered or been finally ordered to register—the “employment,” “passport,” and “alien” provisions. Again, we assume *arguendo* (though the point is doubtful) that petitioner has standing to contest these provisions, which do not apply directly to it, but only to its members (see *supra*, p. 180).

⁴⁰ Petitioner points out (Br. 102) that under § 3 (6) the term “to contribute funds or services” is defined to include the “* * * making of any gift, *subscription*, loan, advance, or deposit, of money or of anything of value * * *” (emphasis supplied). From this it reasons that the prohibition of § 5 (a) (2) (A) extends to “subscribing” to a publication of an organization ordered to register, which, it argues, is a “crass violation of freedom of the press” (*ibid.*). It is clear, however, under the principle of *eiusdem generis*, that Congress, in using the term “subscription,” meant the act of subscribing in the sense of “promis[ing] to give or contribute, by writing one’s name with the amount” (Webster’s *New International Dictionary*, 2d ed., unabridged), rather than in the more colloquial sense of “enter[ing] one’s name for a newspaper, a book, etc.” (*ibid.*). (This particular argument has apparently not occurred to petitioner previously; it is advanced for the first time in this Court.)

(i) *The employment restrictions*

The employment restrictions are broadly divisible into three types:—prohibitions against (a) employment by the Federal Government, (b) employment in any defense facility, and (c) holding office in or employment with any labor organization or as an employer-representative in a proceeding under the National Labor Relations Act.

a. *The prohibition against employment by the Federal Government*

When an organization is registered under the Act or has been finally ordered to register, all of its members having knowledge or notice of that fact are forbidden to conceal or fail to disclose their membership in seeking, accepting, or holding any non-elective employment with the Federal Government (§ 5 (a) (1) (A)) or to hold such employment (§ 5 (a) (1) (B)), under penalty of a fine or imprisonment or both (§ 15 (c)).

The reasonableness and validity of these provisions is clear. "The restrictions upon Government employment," as the court below observed, "are directly related to the substantive evil at which Congress was aiming in this statute. Infiltration of government by world Communist adherents is one of the specified evils recited by the Congress, and certainly a prohibition of Government employment to such adherents is a di-

rect attack upon that evil. Indeed we can think of no more direct relationship than that which would exist between the objectives of the world Communist movement, as it is described in this statute, and the occupation of Government positions by members of a Communist-action organization" (Op. 33, R. 2110).

The prohibition applies only to those members who continue to remain such with knowledge or notice that the organization to which they belong either has voluntarily registered under the Act or has been finally ordered to do so. *Bona fide* termination of membership ends the applicability of the provisions. That Congress possesses the power to bar from the ranks of employees of the United States Government persons who knowingly remain members of an organization after that organization has been duly found to be a Communist-action organization, and has been finally ordered to register as such, is not to be doubted. *Wieman v. Updegraff*, 344 U. S. 183, 188-192; *Adler v. Board of Education*, 342 U. S. 485; *Garner v. Los Angeles Board*, 341 U. S. 716; E. O. 9835 of March 21, 1947 (12 F. R. 1935); E. O. 10450 of April 27, 1953 (18 F. R. 2489); see also *supra*, pp. 180-181. And the power to exclude such members from government employment entirely includes the power to penalize those who

willfully conceal their membership in order to obtain or continue to hold such employment.⁵⁰

b. The prohibition against employment in any defense facility

When an organization is registered under the Act or has been finally ordered to register, all of its members having knowledge or notice of that fact are prohibited from concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility (§ 5 (a) (1) (C)) or, if the organization is a Communist-action organization, from working in any defense facility (§ 5 (a) (1) (D)), under penalty of a fine or imprisonment or both (§ 15 (c)).

These provisions are on a par with those relating to government employment. The court below summed up the pertinent considerations when it said, "We think the considerations which validate power to forbid Government employment likewise support the power to forbid defense facility employment. The latter employment is sensitive business, and it would be sheer folly to say that

⁵⁰ See pp. 201-206, *infra*, for our reply to petitioner's contention (Br. 72-75) that the government-employment prohibition violates due process because of its alleged failure to require proof of knowledge on the part of the member of the character of the organization.

the Government cannot close the gates of such facilities against those who are knowingly members of organizations under the dominion of a foreign government" (Op. 34, R. 2111). Particularly is this true, we would add, when the foreign government is the very *raison d'être* of most of these defense facilities.

The manifest purpose of these provisions is to guard against sabotage and espionage in establishments vital to the national defense. They constitute a valid exercise of the war and defense powers. Congress has never regarded itself, or been thought by the courts to be, impotent to deal with the problems of sabotage and espionage in defense facilities. See, for example, 18 U. S. C. §§ 793-794 (espionage); 18 U. S. C. §§ 2151-2156 (sabotage); *Korematsu v. United States*, 323 U. S. 214, 216-217; *Gorin v. United States*, 312 U. S. 19; *United States v. Gray*, 207 F. 2d 237, 241 (C. A. 9); *Parker v. Lester*, 112 F. Supp. 433, 443 (N. D. Cal.), appeal dismissed, 191 F. 2d 1020 (C. A. 9).

Nor is Congress limited, in striking at these evils, to exacting criminal penalties after they occur. It can adopt reasonable measures to prevent their occurring. The *Gray* case involved the constitutionality of the so-called Magnuson Act of August 9, 1950, c. 656, 64 Stat. 427, 50 U. S. C. §§ 191, 192, which, together with the regulations promulgated under it (see E. O. 10173 of October

18, 1950 (15 F. R. 7005); E. O. 10277 (16 F. R. 7537); E. O. 10352 (17 F. R. 4607)), are known as the Port Security Program. It provides for Coast Guard screening of workers in harbors, ports, vessels, and waterfront facilities. The Court of Appeals for the Ninth Circuit, while it found the procedures in the particular cases before it defective, had no doubt of the power of Congress to prohibit members of subversive organizations from engaging in employment which would give them opportunities to commit sabotage and espionage. "There seems no reason to doubt," said the court (207 F. 2d at 241), "that the screening operation initiated by the Magnuson Act is a legitimate war measure." Similarly, the court in *Parker v. Lester*, *supra*, 112 F. Supp. at 443, referred to the same Port Security Program as being justified by "the undoubted right of the Nation to protect itself from subversion."

✓ If ship and harbor workers may, subject to criminal penalties for non-compliance (50 U. S. C. § 192), be denied clearance to work as a security measure to protect our merchant marine and harbor facilities, we submit that the same considerations justify the prohibitions of § 5 (a) (1) (C) and (D) of the Act at bar. Both programs subject violators to criminal sanctions appropriate to curb the evil aimed at. Both are valid exercises of the nation's power to provide for its own survival.

We must assume that the Secretary of Defense, under the power granted him by § 5 (b), will designate "defense facilities" just as vital to national security as are ships, ports, and waterfront installations. And despite petitioner's claim of "unfettered" and "unreviewable authority" to designate all private enterprises, including the most non-sensitive (Br. 102), it is evident that the Secretary's discretion, while unquestionably broad, would not be unlimited; the rule of reason would apply here as elsewhere to supply a remedy if the authority were abused. Petitioner's further argument that its members should necessarily be allowed to work in "non-sensitive jobs in sensitive businesses" even if they can lawfully be excluded from the "sensitive" jobs in the "sensitive businesses" (Br. 102) is also untenable. Neither Congress nor the Secretary of Defense is constitutionally required to make what would surely be problematical distinctions between "sensitive" and "non-sensitive" jobs at such installations, say, as the Oak Ridge laboratories.⁵¹ Congress has the power, if that is its policy, wholly to bar those who insist on remaining a part of the world Communist movement from establishments which, be-

⁵¹ At the present time, by contract, the Secretary of Defense exercises his discretion as to which physical areas of defense facilities that have classified government contracts shall be accessible only to persons having security clearance.

course of the general nature of their business, are properly classifiable as "defense facilities."

c. *The prohibition against holding office or employment with a labor organization or as an employer-representative in a proceeding under the National Labor Relations Act*

When an organization is registered under the Act or has been finally ordered to register, it becomes unlawful for any member having knowledge or notice of that fact to hold office in or employment with any labor organization as defined in the National Labor Relations Act (see fn. 21, *supra*, p. 82), or to represent any employer in any proceeding under that Act (§ 5 (a) (1) (E)), under penalty of a fine or imprisonment or both (§ 15 (c)).⁶²

By its terms this prohibition is applicable only to the holding of office in or employment by labor organizations; it does not extend to mere membership in a union. We submit that the validity of this provision is a logical corollary of *American Communications Assn. v. Douds*, 339 U. S. 382. The Court there sustained the validity of § 9 (h) of the Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, under which the benefits of that Act were limited to unions whose officers filed with the Labor Board affidavits attesting that they were not members of

⁶² This provision was added to the Subversive Activities Control Act by § 6 of the Communist Control Act of 1954, 68 Stat. 777.

the Communist Party. The objective of the clause in issue, as the Court observed, was the elimination of the obstruction to interstate commerce resulting from the so-called "political strike," which Congress had found after lengthy studies to be the result of the infiltration by Communist Party members into positions of power in labor organizations (339 U. S. at 388-389). "No useful purpose would be served," said the Court, "by setting out at length the evidence before Congress relating to the problem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action" (*ibid.*). See also *Osman v. Douds*, 339 U. S. 846; *National Labor Relations Board v. Highland Park Co.*, 341 U. S. 322, 325; *National Labor Relations Board v. Dant*, 344 U. S. 375, 385.

The *Douds* decision thus accepted as a reasonable basis for the non-Communist affidavit legislation the congressional finding that Communists in positions of influence in labor unions tend to promote political strikes and thereby to endanger

the national interest in time of peace as well as of national peril. This finding was reinforced by the findings of § 2 of the Act at bar, which emphasize even more forcefully the need to keep adherents of the world Communist movement out of positions of influence in labor and industry (see, particularly, § 2 (1) and (15)).⁵³

On that basis, there is no significant difference between the policy and purpose of § 9 (h) of the amended National Labor Relations Act and § 5 (a) (1) (E) of the Subversive Activities Control Act. If a union officer who cannot subscribe to a non-Communist affidavit can be forced out of his position of leadership in the union by the indirect method of depriving his union of rights it would otherwise enjoy before the Labor Board, there can be no infirmity in directly prohibiting him from being on a labor union staff as an officer or employee. The justification for either method is the same—the reasonableness of removing from positions of influence in unions those persons who can reasonably be expected to use these positions to the detriment of the nation.

⁵³ See also the passage of the Board's report (R. 67-71 [1926-1933]) relating to Communist infiltration into the labor union movement, the control exercised by Communists over national trade union activities, the systematic training of Communist organizers to gain leverage within the basic industries, and the use made by petitioner of the political strike as an effective means of crippling the economy in periods of crisis.

In neither case is any person permanently or categorically barred from holding such a position—he can by renouncing in good faith his Communist ties resume his eligibility with respect to his union. *American Communications Assn. v. Douds, supra*, 339 U. S. at 414. His ineligibility is only with respect to a special category of employment and lasts only for so long as he continues it by a self-imposed exile.” See also *infra*, pp. 201–206, 208–209.

There is thus no justification for petitioner’s reference to the “sanction against trade-union employment” as a “blatant example of the unconstitutional blunderbuss technique of the Act” (Br. 103). Nor is petitioner correct in saying that § 5 (a) (1) (E) is not “an exercise of the commerce power” (*ibid.*). By its terms the paragraph is limited to the holding of office in or employment with labor organizations as defined in the National Labor Relations Act, the scope of which, in turn, is limited by the commerce clause (29 U. S. C. § 152 (6)). The paragraph is thus a joint exercise of the commerce power and the other powers referred to in § 2 (15) (see *supra*, pp. 68–69). It is true that, as petitioner says, the

⁵⁴ We are dealing here only with *members* of a Communist-action organization. No self-appraisal or searching for subjective beliefs is called for—unlike some aspects of the non-Communist affidavit clause of the Labor Act. See *Osman v. Douds*, 339 U. S. 846.

reach of the paragraph "extends to every employee of every trade union"—provided that by "trade union" is understood "labor organization" as defined in the Labor Relations Act—regardless of the extent to which a particular position may be one "of power over the national economy" (Br. 103). But Congress is under no constitutional duty to make calculations as to the amount of "power over the national economy" a position in a labor organization must possess before barring from its occupancy members of an organization required to register under this Act. This argument by petitioner is on a plane with its similar argument (see *supra*, pp. 188–189) that Congress, though it may bar petitioner's members from "sensitive" jobs in "sensitive businesses", *must* allow them to fill "non-sensitive" jobs in those enterprises.

What has been said with respect to the prohibition against holding office or employment with a labor union applies with equal force to the prohibition against representing any employer in any proceeding arising under the Labor Act. The same logic which underlies the need to eradicate members of Communist-action organizations from positions of influence in labor unions is equally applicable to management representatives, who, from their places on the other side of the bargaining table, could not only exert an adverse influence on interstate labor-management relations

and thus on interstate commerce, but could use their positions for political ends to the same (if not to a greater) extent as union officials. Such representatives are clothed with broad powers and enjoy "an operating participation in governmental facilities." *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, 172 (D. D. C.), affirmed, 334 U. S. 854.

(ii) *The passport provisions*

When an organization is registered under the Act or an order directing it to register has become final, members of the group having knowledge or notice of that fact are prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (§ 6 (a)). In addition, officers and employees of the United States are forbidden to issue passports to or renew passports of any individuals whom they know or have reason to believe to be members of a Communist-action organization which has registered or been finally ordered to register (§ 6 (b)). Violations of these prohibitions are punishable by fine or imprisonment or both (§ 15 (c)). Taken together, these provisions remove from eligibility for passports all persons who remain members of a Communist-action organization after it registers or is finally ordered to do so.

At the present time, a passport has the dual function of extending governmental protection

while abroad and also of granting permission to travel to many parts of the world. See *Schachtman v. Dulles*, C. A. D. C., decided June 23, 1955. In the first aspect, a passport is addressed to foreign governments and requests for the holder "permission to come and go as well as lawful aid and protection." *United States v. Browder*, 113 F. 2d 97, 98 (C. A. 2), affirmed, 312 U. S. 335; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 493; cf. *Urtetiqui v. D'Arcy*, 9 Pet. 692, 698. An American passport "indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other purpose." 3 Hackworth, *Digest of International Law* (1942), ch. X, § 259. Certainly, as remarked by the court below, "the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in this statute. Surely a government owes no duty of protection

to those who, dominated by a foreign organization, seek its overthrow" (Op. 34, R. 2111).

The passport sanction is also valid insofar as it prevents travel abroad by members of a Communist-action organization.⁶⁵ Congress has specifically found in the Act that, "[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (§ 2 (8)). It is evident that the unity and cohesive force of the world Communist movement, and its capacity to endanger the independence of this Government and the continuation of our free institutions, are promoted through personal contacts of its members both

⁶⁵ Under the pre-existing legislation, it has been held that the Department of State, in exercising its discretion to grant a passport, has the power to require that an applicant disclose his connection with the Communist Party. *United States v. Eisler*, 75 F. Supp. 640, 646 (D. D. C.), affirmed, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958. Pursuant to the authority delegated to it under 22 U. S. C. § 211a, the Department of State has promulgated rules under which, if membership in the Communist Party is admitted, an applicant for a passport must be refused one without a hearing. 17 F. R. 8013-8014, issued August 28, 1952 (22 C. F. R. §§ 51.135, 51.142).

here and abroad. For one thing, there is evidence that American Communists have secured the traditional indoctrination given to most non-Russian Communist leaders (see R. 89-93 [1965-1971]), and travel abroad by local Communist leaders certainly facilitates their effectiveness as couriers, both of intelligence to foreign countries and of directives to this country. Aside from the findings of the Board on this subject (R. 89-98 [1964-1982]), it is also of judicial record that Communist leaders have made fraudulent use of passports in the past. See, e. g., *Browder v. United States*, 312 U. S. 335; *Eisler v. United States*, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958. For these reasons, the barring, in effect, of foreign travel outside of the Western Hemisphere (see Br. 103) to persons continuing their membership in an action organization is valid as an appropriate method of obtaining the serious and legitimate congressional objectives embodied in the Act. Cf. *Galvan v. Press*, 347 U. S. 522, 529.

Nor is it unreasonable to impose criminal sanctions for the very act of applying for a passport with knowledge of ineligibility under the law to receive one. Congress might, it is true, have limited itself to the punishment of false representations in and fraudulent use of passports—crimes already defined in the criminal code. 18 U. S. C. §§ 1541-1546; see *Browder v. United*

States, 312 U. S. 335; *Warszower v. United States*, 312 U. S. 342; *United States v. Rubenstein*, 151 F. 2d 915 (C. A. 2), certiorari denied, 326 U. S. 766. But these remedies would not have as effectively prevented attempts by members of covered organizations to obtain passports despite known ineligibility. They could apply for and, perhaps by concealing pertinent information, obtain a passport. The use of aliases is a commonplace among them.⁵⁰ Congress preferred to forestall such frauds by making the application for a passport a crime. The further prohibitions of § 6 (a), relating to the use or attempted use of passports by members of covered organizations, are, for the same reasons, equally reasonable in the light of the Act's objectives, as is the proscription of § 6 (b) against issuing or renewing passports to such persons by federal officers and employees.

(iii) *The provisions applicable to aliens*

a. *Exclusion and deportation*

Petitioner's concession that it "recognize[s] that *Galvan v. Press*, 347 U. S. 522, is decisive of the validity of the deportation and exclusion sanctions" (Br. 72, fn. 31) eliminates the need for further discussion of these particular sanctions,

⁵⁰ See, for example, the aliases used by Gerhardt Eisler and other foreign representatives to petitioner (R. 59-60 [1911-1913]), particularly fn. 42, R. 60 [1912]).

the terms of which are set forth at pp. 82-83, *supra*.

b. Ineligibility for naturalization

Under § 313 (a) (2) (G) of the Immigration and Nationality Act of 1952, which substantially reenacts and carries forward the relevant provisions of the now-repealed § 25 of the Subversive Activities Control Act, any alien who is a member of or affiliated with a Communist-action organization during such time as it is registered or required to be registered under the latter Act is ineligible for naturalization. Petitioner, while it does not expressly admit the validity of this sanction, does not specifically challenge it (see Br. 104-105). In any event, there can be no real doubt of its constitutionality, in view of the plenary power of Congress to impose conditions upon the conferring of citizenship by naturalization. *Schneiderman v. United States*, 320 U. S. 118, 131; *United States v. Macintosh*, 283 U. S. 605, 615. See Note, *The Internal Security Act of 1950* (1951), 51 Col. L. Rev. 606, 644-645. Certainly, it lies within the power of Congress to withhold the privilege of citizenship from alien members of an organization found to be the domestic instrument of the foreign government or group controlling the world Communist movement and to be dedicated to promoting the objectives of that movement. If the exclusion and deportation sanctions are valid, as petitioner concedes (*supra*, pp. 198-199), the validity of this sanction follows *a fortiori*.

c. Denaturalization

Section 25 of the Act, besides enacting the prohibition against naturalization just discussed, contained a further provision amending the nationality laws with respect to denaturalization proceedings. Like the other provisions relating to immigration and nationality, this provision is now contained in the Immigration and Nationality Act of 1952, which carried it forward as § 340 (c). Applying only to persons who become naturalized after the effective date of the latter Act,⁵⁷ it provides that if any such person shall within five years next following his naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded him from naturalization under the provisions of § 313,⁵⁸ that fact shall be considered *prima facie* evidence, warranting revocation of citizenship in a denaturalization proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to

⁵⁷ *I. e.*, December 24, 1952. The Immigration and Nationality Act, passed on June 27, 1952, took effect 180 days later (§ 407, 66 Stat. 281). The provision in question in its original form, *i. e.*, before it was transferred to the Immigration and Nationality Act of 1952, applied to persons naturalized "after January 1, 1951" (§ 25 of the Subversive Activities Control Act, 64 Stat. 1013).

⁵⁸ This includes Communist-action organizations registered or required to register under the Subversive Activities Control Act (see *supra*, pp. 82-83).

the good order and happiness of the United States at the time of his naturalization.

We submit that this sanction is likewise valid. Persons who obtain their naturalization after December 24, 1952, do so subject to the conditions and provisions laid down by Congress, including this provision. There can be no question of retroactivity, or of the Government's taking back its grant of citizenship on grounds which the naturalized person could have had no reason to anticipate when he received it. In view of the broad power of Congress to impose conditions on its grant of citizenship (*Schneiderman v. United States*, *supra*, 320 U. S. 118, 131; *United States v. Macintosh*, *supra*, 283 U. S. 605, 615) and the reasonableness of the rebuttable presumption established by this provision for the future, it cannot be said to be beyond congressional authority. Cf. *Galvan v. Press*, 347 U. S. 522; *Carlson v. Landqn*, 342 U. S. 524, 535-536.⁵⁹

2. *The member-sanction provisions do not rest on innocent or unknowing past membership and therefore do not deprive petitioner's members of due process*

Petitioner contends (Br. 72-75) that the sanctions imposed on members of action organizations

⁵⁹ The court below did not pass upon this provision. It said, "A denaturalization does not flow automatically from registration; a regular proceeding for the purpose must be brought. No such case is before us * * *" (Op. 38, R. 2115). Accordingly, the court expressed no views as to the validity of this sanction, saying that decision thereon "must await a specific test" (*ibid.*).

which have registered or been ordered to register are imposed "solely because of their association" and without regard to whether or not they have "knowledge of the claimed illicit purposes of the organization", in alleged violation of the rule of *Wieman v. Updegraff*, 344 U. S. 183 (Br. 73). Petitioner also argues that, because the Act "makes conclusive a presumption of unfitness [i. e., to do the things forbidden by the sanctions] arising from membership," it conflicts with *Adler v. Board of Education*, 342 U. S. 485 (*ibid.*).⁶⁰

Petitioner's contention that the member-sanctions are visited upon "innocent" and "unknowing" members fails to take adequately into account the conditions which must be fulfilled before those sanctions become applicable. We limit our discussion to those member-sanctions applicable to citizens, *viz.*, the employment restrictions and passport prohibitions. The alien sanctions are not, we believe, open to any serious challenge on the grounds urged.⁶¹ The employment and

⁶⁰ We point out, once again, that petitioner raises this issue on behalf of its members, none of whom are before the Court.

⁶¹ As has been seen, petitioner concedes the validity of the exclusion and deportation sanctions (*supra*, pp. 198-199), and, for the reasons set forth at p. 199, *supra*, we believe the validity of the naturalization sanction to be equally beyond dispute. The denaturalization sanction (*supra*, pp. 200-201), establishing a *rebuttable* presumption for the future, is plainly not subject to the type of challenge we are now discussing.

passport provisions (and their supporting criminal penalties) are applicable only when the members of an organization have "knowledge or notice"⁶² either that the organization has registered voluntarily or has been finally ordered to do so after court review (§§ 5 (a) (1), 6 (a)).⁶³ In complaining that these sanctions are imposed on members without regard to whether or not they have "knowledge of the claimed illicit purposes of the organization," petitioner must be arguing that it is not permissible to impose sanctions on a member if he does not agree with the organization's own estimate of its character or with the formal finding made by the Board and upheld by

⁶² The Act provides that publication in the Federal Register of the fact that an organization has registered or been finally ordered to register "shall constitute notice to all members of such organization" that it has so registered or been finally ordered to do so (§§ 9 (d), 13 (k)). Since petitioner does not challenge the validity of these provisions (see Br. 74, fn. 34), we shall not discuss them otherwise than to state that their validity is clear under such decisions as *United States v. Balint*, 258 U. S. 250, 251-252, and *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 68-70.

⁶³ As petitioner points out (Br. 74), an officer or employee of the United States is forbidden under § 6 (b) to issue a passport to any individual who he knows or has reason to believe is a member of a registered action organization or of an action organization which has been finally ordered to register, without regard to any "knowledge or notice" on the part of the applicant for the passport. This special situation, however, does not, in our opinion, affect the due process issues raised by petitioner. Cf. Op. 28, R. 2105.

the courts. Nothing in the due process clause or this Court's *Wieman* decision, *supra*, 344 U. S. 183, requires such a result.

Wieman held that the due process clause does not permit "a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they *had* belonged" (344 U. S. at 190, emphasis added). "[M]embership may be innocent," observed the Court (*ibid.*), and "[i]ndiscriminate classification of innocent with knowing activity. * * * offends due process" (at 191). But the employment and passport provisions of the Act at bar are not imposed on "innocent," "unknowing," *former* members of any organization. They apply only to *current* members of organizations which either admit being (by registering) or are formally found to be (by a judicially reviewed Board finding) substantially controlled by the foreign government or group which controls the world Communist movement, and to be primarily operating to advance the objectives of that movement.

If perchance a member was not aware of these facts before the organization's registration or the entry of a final order directing it to do so, he is made aware of them when the one or the other of these eventualities occurs. He then has it within his power to "renounce the allegiances"

and effect a "voluntary alteration of the loyalties" (*American Communications Assn. v. Douds*, 339 U. S. 382, 414) which threaten to bring disabling consequences on him. He can avoid the Act's sanctions by a good-faith termination of his membership. There is thus no possibility of the unconscionable result against which the *Wieman* decision was aimed, viz, preclusion from legitimate employment opportunities by innocent and unknowing memberships and associations of one's past. And if the member knowingly continues his membership, he is properly subject to the sanctions. See *Adler v. Board of Education*, 342 U. S. 485; *Garner v. Los Angeles Board*, 341 U. S. 716; *Gerende v. Election Board*, 341 U. S. 56.

Nor is petitioner's second due process contention (*supra*, p. 202)—i. e., that based on its reading of *Adler v. Board of Education*, 342 U. S. 485—any more tenable. If we correctly understand the contention, it is that, after an organization has registered as a Communist-action organization, thereby admitting its character as defined in § 3 (3), or after it has been formally found to be such an organization by a Board finding which has been judicially reviewed and sustained, each member of the organization must be afforded an opportunity personally to rebut the organization's own estimate of its character, or the judicially affirmed Board finding with respect thereto, before any member-sanction can be made applicable to

him on account of his continued membership. Nothing in the *Adler* decision, we submit, requires so strained a result.

3. *The sanction provisions do not make of the Act a bill of attainder*

Petitioner also contends (Br. 60-64) that the sanction provisions make of the Act a bill of attainder, forbidden by Article I, § 9, clause 3 of the Constitution. The Act, it says, "imposes various sanctions on the organization identified by the registration order and on its members" after giving the organization "only an administrative hearing; not a judicial trial" and thus, allegedly, "meets the definition of a bill of attainder" (Br. 61).

A bill of attainder is a legislative act which inflicts punishment without a judicial trial on named individuals or on easily ascertainable members of a group for past conduct. *Cummings v. Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 377; *United States v. Lovett*, 328 U. S. 303, 315-317; *American Communications Assn. v. Douds*, 339 U. S. 382, 413-414; *Garner v. Los Angeles Board*, 341 U. S. 716, 722. Petitioner's attempt to depict itself as a possible victim of a bill of attainder, by referring to an order directing an organization to register as a "death sentence on the organization," comparable to "execution of an individual" (Br. 61;

cf. Br. 63), is unavailing. The punishment inflicted must be visited on individuals.

The punishment inflicted, however, need not necessarily be punishment in the usual sense of fine or imprisonment. It may consist of deprivation of the privilege of pursuing a certain profession (*Ex parte Garland, supra*, 4 Wall. at 377), or in some circumstances of working for the Government (*United States v. Lovett, supra*, 328 U. S. at 316), or, in general, of "any rights, civil or political, previously enjoyed," depending upon "the circumstances attending and the causes of the deprivation." *Cummings v. Missouri, supra*, 4 Wall. at 320; *Garner v. Los Angeles Board, supra*, 341 U. S. at 722. But it is necessary that there be *punishment* and that the conduct punished be *past* conduct. *American Communications Assn. v. Douds, supra*, 339 U. S. at 413-414.

Applying these principles to this Act, there can be no question of its being a bill of attainder. Under the Act, after an organization has either voluntarily registered with the Attorney General or been finally ordered to do so by the Board, its members incur the various disabilities and restrictions which have been called sanctions. That is, certain avenues of employment are foreclosed to them, they are no longer free to use passports, and, if aliens, they become excludable,

deportable, and ineligible for citizenship. We have shown (*supra*, pp. 182-201) that these sanctions are all reasonable restrictions in the light of the objectives of the Act and the evil at which it strikes. Furthermore—and most importantly with regard to the bill-of-attainder argument—the “members” on whom these sanctions are imposed are not past or former members of the organization, but *current* members. The sanctions have no retroactive effect; they apply only to persons who continue their membership in the organization after it has registered or been finally ordered to do so, or who become members thereafter. *Bona fide* termination of membership by any person who is a member up to the time of registration or the time when an order to register becomes final precludes the sanctions’ taking effect as to him.

The *Douds* decision, upholding the non-Communist oath provision against a similar attack, is precisely applicable to the case at bar, as petitioner practically concedes (Br. 63). Just as “there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the [non-Communist] affidavit” (339 U. S. at 414), so too there is no present member of petitioner who may not, by a voluntary and good-faith termination of that membership prior to the time when the order directing registration becomes final, avoid the re-

strictions and disabilities imposed by the Act. For this reason, regardless of whether those restrictions and disabilities be deemed of a penal nature or not, the Act lacks one of the essential characteristics of a bill of attainder, viz, the punishment of *past* action or conduct. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 403.

III

THE COURT BELOW CORRECTLY SUSTAINED THE BOARD'S ULTIMATE FACTUAL FINDING THAT PETITIONER IS A COMMUNIST-ACTION ORGANIZATION AS DEFINED IN THE ACT

A. THERE IS NO OCCASION FOR A SECOND JUDICIAL REVIEW OF THE BOARD'S FACTUAL FINDING THAT PETITIONER IS A COMMUNIST-ACTION ORGANIZATION

The evidence in this proceeding consists of more than 14,000 typewritten pages of testimony from 25 witnesses (R. 134-136 [2045-2049], and more than 500 exhibits. Its presentation consumed more than 14 months (R. 2 [1805]). A unanimous Board found, on the basis of the "overwhelming weight of the evidence" (R. 132 [2042]; see also R. 133 [2044]), that petitioner is a Communist-action organization as defined in the Act and, as such, required to register. The Board presented the grounds of this finding, and the subsidiary findings on which it rests, in an exhaustive report covering 133 printed pages, which also appears in the record in annotated form, i. e., with supporting refer-

ences to the testimony and exhibits (R. 1-133 [1804-2044]). This Report, arranged under appropriate headings and subheadings, summarizes the evidence on both sides; where issues of credibility were met on important points, the Board recorded its position, and where there were conflicts in the testimony on particular issues, the Board resolved them.

The court below, in discharge of its statutory obligation under § 14 (a) of the Subversive Activities Control Act, after a painstaking review of the entire record, determined that the Board's finding was "supported by the preponderance of the evidence" (Op. 75-76, R. 2152-2153), that is to say, by the greater weight of the evidence. See *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266; *General Foods Corp. v. Brannan*, 170 F. 2d 220, 223-224 (C. A. 7). The court recognized that the statutory "preponderance of the evidence" test imposed "a less stringent restriction upon the function of judicial review than is customary in such statutes"⁴⁴ and that "[b]y the same token it imposes a laborious task upon the reviewing court" (Op. 49, R. 2126). See 96 Cong. Rec. 13764-13765. Cf. *Universal*

⁴⁴ The usual rule is that the findings of the administrative agency, if "supported by substantial evidence," shall be final. See, e. g., Administrative Procedure Act, § 10 (e) (5), 5 U. S. C. § 1009 (e) (5); National Labor Relations Act, as amended, 29 U. S. C. § 160 (e).

Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 492; *General Foods Corp. v. Brannan*, 170 F. 2d 220 (C. A. 7); *Great Western Food Distributors v. Brannan*, 201 F. 2d 476, 479 (C. A. 7), certiorari denied, 345 U. S. 997. Accordingly, in discharge of its heavy responsibility for review, which it recognized, the court devoted more than a third (Op. 48-76, R. 2125-2153) of its 76-page opinion to a discussion and analysis of the evidence on both sides. In those pages the court, while not attempting to "comment upon the evidence on each minute issue of fact" or to "evaluate particles of proof," did "indicate the extent, nature, particularity, and personal character of the testimony presented by the Government, and the nature and extent of the evidence presented by [petitioner], including the character of both its denials and its explanations" (Op. 49, R. 2126). The court concluded from this exhaustive review that two of the Board's eight subsidiary findings should be modified in respects which we shall discuss below (*infra*, pp. 257-261), but that otherwise all of the Board's findings, including its ultimate and decisive finding that petitioner is a Communist-action organization as defined in the Act, were supported by the preponderance of the evidence (Op. 75-76, R. 2152-2153).

This being the posture in which the case reaches this Court, we submit that there is no occasion for this Court to subject the lengthy transcript to a second judicial review for the purpose of

reappraising and reevaluating the evidence and determining its sufficiency to support the Board's findings and order. Section 14 (a) of the Act provides that, where review of a Board order is sought:

The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *.

Relying on a similar provision in the Taft-Hartley Act, this Court in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498, 502, held that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders," and concluded (*id.*, 502-503):

The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

This view was emphatically reiterated in *National Labor Relations Board v. American Insurance Co.*, 343 U. S. 395, 409-410; cf. *Federal Communications Commission v. Allentown Broadcasting Co.*, 349 U. S. 358, 364-365.

We suggest that, under the Subversive Activities Control Act, Congress charged the Courts of Appeals and not this Court with the primary responsibility for ascertaining that the findings of the Board are supported by a preponderance of the evidence. This should lead this Court to do no more than to satisfy itself that the Court of Appeals made a fair assessment of the record on the issue of the sufficiency of the evidence. That the Court of Appeals did so, we submit, is evident from its opinion.

B. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S FINDINGS AS BASED ON THE PREPONDERANCE OF THE EVIDENCE

The Board found that petitioner, "[u]pon the overwhelming weight of the evidence", "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement" and "operates primarily to advance the objectives of such world Communist movement" (R. 132 [2042]). These findings brought petitioner within the § 3 (3) definition of a Communist-action organization and made it subject, as such, to the mandatory registration requirements of the Act. In this sense these findings may be described as the ultimate or decisive findings of the Board. In addition to these ultimate findings, the Board made subsidiary findings keyed to the eight paragraphs under § 13 (e), which lists the various factors required to be taken into consideration by the Board in

arriving at its ultimate determination. See *supra*, pp. 132-154. Thus, for example, the Board made a finding, corresponding to § 13 (e) (1), that petitioner's "policies are formulated and carried out and its activities are performed pursuant to directives of, and to effectuate the policies of, the Soviet Union, which directs and controls the world Communist movement" (R. 79 [1947-1948]). Similarly, the Board made a finding, corresponding to § 13 (e) (2), that petitioner's "views and policies do not deviate from those of the Soviet Union" (R. 86 [1959]). And so on with respect to the other paragraphs of § 13 (e).

The evidence of record is elaborately summarized in the Report of the Board, which contains detailed supporting references. It has further been carefully reviewed in briefer form in the opinion of the Court of Appeals, which on the basis of its "laborious" study of the record affirmed the order of the Board as supported by "the preponderance of the evidence." It would accordingly lengthen this brief to no useful end to go over the same ground a third time here. Nor does this appear to be required in this case, for petitioner makes no attempt to assay the significance of any of the proof it attacks from the standpoint of the sufficiency of the evidence as a whole. Its attack, rather, is concentrated on the minutiae of the evidence, frequently lifted out of context. This fragmentary approach overlooks the fact

that, as the court below remarked, "all relevant facts are cumulative in delineating a completed whole" (Op. 61, R. 2138). One knows "fish from fowl," to use the court's figure (*ibid.*), as a result of simultaneous consideration of an accumulation of evidence, seen from an over-all view. Petitioner's approach to the evidence ignores the fact that, to change the figure, an unmistakable pattern or mosaic can emerge from numerous fragments having little individual significance. "When the parts are put together," the court below observed, "the picture is clear and forceful" (Op. 75, R. 2152). Cf. *Interstate Circuit v. United States*, 306 U. S. 208, 223-226.

Viewed from the standpoint of the record as a whole, petitioner's criticisms are but pinpricks at the evidence, often relating to matters having obviously minor bearing on the ultimate issue. It is evident, moreover, that the members of the Board, who saw and heard and questioned the witnesses on both sides and could observe their demeanor on the witness stand, had seats of vantage from which to see the development of the picture which the evidence, viewed as a whole, so clearly portrays.

We deal below with petitioner's attack on the evidence relating to the statutory considerations listed in § 13 (e) (Br. 120-158), its contention that the Board's conclusion that petitioner is a Communist-action organization is based on evidence of

conduct which has been discontinued (Br. 160-170), and its attack on the legislative determination, underlying the Act, that there exists a world Communist movement as described in § 2 (Br. 193-199).

1. The Board and the court below correctly construed and applied the evidentiary considerations enumerated in § 13 (e) of the Act

Congress, in § 13 (e) of the Act, directed the Board, in "determining whether any organization is a 'Communist-action organization'", to "take into consideration" the "extent to which" the organization or its leaders do certain things. We have previously indicated the error in petitioner's assumption that these evidentiary factors are "tests" of whether an organization fulfills the § 3 (3) definition of a Communist-action organization as distinguished from matters, as the statute plainly indicates, "to be taken into consideration" and evaluated by the Board in making its ultimate determination (*supra*, pp. 132-133). This error is carried over into petitioner's discussion of the evidence. Thus petitioner contends (Br. 120-160) that the Board's order and the judgment of the court below affirming it "are based on erroneous interpretations of § 13 (e) and on evidence having no rational relation to the criteria of that section or to the definition of a Communist-action organization" (Br. 120). A brief discus-

sion of petitioner's attack on the proof adduced with respect to four of these considerations will expose the insubstantial nature of petitioner's factual contentions when weighed against the obvious purpose of the statutory guides and the thrust of the evidence, considered as a whole.⁶⁵

(a) The directives and policies consideration

Section 13 (e) (1) directs the Board to take into consideration, in determining whether an organization is a Communist-action organization, the extent to which its policies are formulated and carried out and its activities performed "pursuant to directives or to effectuate the policies of" the foreign government or organization which directs and controls the world Communist

⁶⁵ Petitioner's contentions with respect to the proof relating to the remaining four evidential factors, which we do not discuss, are similarly insubstantial and, in view of the force of the findings which we review, of cumulative significance only. The court below modified the Board's findings with respect to "reporting" (Br. 146-150) and "secret practices" (Br. 153-154), but correctly concluded that these modifications did not require a remand to the Board in view of the overwhelming nature of the findings which were sustained (Op. 72, 73-74, R. 2149, 2150-2151; see *infra*, pp. 257-261). The Board did not rely heavily on the evidence relating to "financial aid" (see Br. 145), all of which, with but one exception, related to the pre-1940 period (R. 88-89 [1964]). Similarly, the Board found, with respect to the "instruction and training" factor (Br. 146), that there was "no substantial evidence of record showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 92 [1971]).

movement. The Board devoted more than one-half of its 133-page Report (R. 9-79 [1820-1948]) to a review and analysis of the evidence pertaining to this factor. It stated its conclusions under this heading in eleven numbered paragraphs (R. 78-79 [1946-1948]), the last of which, using the substance of the language of § 13 (e) (1), was that "[petitioner's] policies are formulated and carried out and its activities are performed pursuant to directives of, and to effectuate the policies of, the Soviet Union, which directs and controls the world Communist movement" (R. 79 [1947-1948]). The remaining ten paragraphs were in the nature of subsidiary conclusions, on which the eleventh was based. One of the ten—the fourth (R. 78 [1946])—stated that:

Marxism-Leninism, as understood, used and followed by [petitioner], consists of a body of doctrine, policies, strategies and tactics intended to bring about the end of capitalism and substitute for it a dictatorship of the proletariat; it has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, directives and instructions governing the world Communist movement.

Corresponding to the foregoing paragraph of its conclusions, the Board, in the body of its Report, following an extended discussion of the so-called

Marxist-Leninist "classics"—consisting primarily of the writings of Marx, Lenin, and Stalin (R. 21 [1841])—have said (R. 43 [1882]):

Consequently, we conclude that the Classics are one of the chief means by which the CPSU [Communist Party of the Soviet Union] directs, dominates, and controls the CPUSA.

From the 70 pages of the Report dealing with the "directives and policies" factor petitioner selects the two above-quoted statements (Br. 122, 123) as establishing that the Board erroneously adopted the "thesis" that a "comprehensive body of thought" setting forth a "unified and all-embracing view of man and nature" and covering "almost every area of human thought and activity"—i. e., Marxism-Leninism—constitutes "a set of 'directives and instructions,' promulgated and issued' by the Soviet Union [to petitioner]" (Br. 123). Petitioner points out that some of the literature of Marxism-Leninism was "written long before there was a Soviet Union" (Br. 124).

The statements in question, however, when read in context, fail to support petitioner's argument. Their immediate context shows—petitioner omits the qualifying words in its quotation at Br. 122—that it was "Marxism-Leninism, *as understood, used and followed by [petitioner]*" (R. 78 [1946], emphasis added) about which

the Board was speaking. And the Board in its Report carefully explained just what the concept, so qualified, connotes (R. 21-44 [1840-1883]). When the term "Marxism-Leninism" is understood in the sense in which the Board used that term, its statements with respect to it and the "classics" are cogently supported by the evidence.

The Board, after pointing out that petitioner describes itself in its constitution as a political party based on the "principles of scientific socialism, Marxism-Leninism" and that its amended answer had admitted that Marxism-Leninism is basic to it (R. 21 [1840-1841]), observed that "Marxism-Leninism is nowhere in the record specifically defined" (R. 21 [1841]). The Board, noting further that it "recognize[d] that the theory of Marxism-Leninism, as such, is not in issue in this proceeding," stated (*ibid.*):

* * * However, in view of the fact that Marxism-Leninism is declared to be basic to [petitioner] and because of the numerous references to it in the course of these proceedings, and in order to cast as much light as possible upon the issues involved, we have deemed it important to determine its actual meaning from the evidence of record. In this section, we present our findings of what it is, *and how it is understood, used and followed by [petitioner]*. [Emphasis added.]

The Board proceeded to trace the history of Marxism-Leninism. After explaining how "Marxism" originated with Marx and Engels in the middle of the nineteenth century, and after stating the basic tenets of that philosophy (R. 21-22 [1841-1843]), the Board pointed out that Lenin "adapted Marxism to Russian revolutionary purposes" (R. 22 [1843]) and that "Stalin later advanced the Marxist-Leninist ideas to a practicality which developed somewhat differently from Marxist theoretical schemes" (*ibid.*). The Board then quoted from Stalin's *History of the Communist Party of the Soviet Union (Bolsheviks)*, which, upon its publication in 1939, became for Communists the world over the supremely authoritative Marxist-Leninist work, superseding in importance all predecessor classics,⁶⁶ to show "how Lenin altered Marxism because of his experience in the Russian revolutions of 1905 and 1917" (R. 23 [1844]). "The tactical aspects of the theory," the Board observed, "thus attains [*sic*] a flexibil-

⁶⁶ See witness Meyer's testimony at R. 689, quoted in the Board's Report (R. 43 [1880-1881], fn. 30). A joint resolution adopted by the Communist Parties of France, Great Britain, the United States, Germany and Italy in August 1939 (A. G. Ex. No. 296, R. 1601-1609) referred to Stalin's *History* as occupying "an extraordinary place among the classic works of Marxism-Leninism" (R. 1602), and stated that the appearance of the work was "one of the greatest events in the life of the Communist world movement" (R. 1601).

ity which would appear to make it mean what the current leaders of the CPSU want it to mean. So regarded, the theory supplies an easy explanation for all phenomena and furnishes a justification for any line of conduct which these leaders have adopted" (*ibid.*).

The Board then proceeded, by extensive references to the classics, all of which were used in Party schools as the basic text books and instruments of indoctrination continuously up to the time of the hearings herein (R. 38 [1872]; see also R. 689, 787-788, 943-946, 949-952, 1014), to show how, throughout, they contain instructions and directives to Party members as to how they should conduct themselves and what action they must take, in working toward the goal of the "dictatorship of the proletariat," in all sorts of tactical situations (R. 28-44 [1855-1883]), depending upon the "ebb and flow" of events (R. 29 [1856]). For example, when the revolutionary tide in a certain country is rising, *i. e.*, when the ruling classes are disorganized and the masses are in a state of revolutionary ferment, mass action culminating in the general strike and armed insurrection is enjoined upon members (*Programme of the Communist International*, A. G. Ex. No. 125, R. 1446, at 1459; cited by the Board at R. 30 [1857]). When, on the other hand, the revolutionary tide is at ebb, members are directed to adopt "united front" tactics, to limit themselves

to "partial" slogans, and to adjust their demands to the everyday needs of workers (*id.*, at R. 1460-1461; cited by the Board at R. 30 [1858]).

Members are directed to carry on ceaseless propaganda against "all forms of chauvinism" and "imperialist maltreatment of enslaved peoples and races" (*id.*, at R. 1457; cited by the Board at R. 30 [1857]). They are instructed to infiltrate and where possible to capture control of trade unions as ready-made instrumentalities for use in the furtherance of the revolutionary goal (Lenin, *What Is To Be Done?*, A. G. Ex. No. 417, pp. 105 ff.; Stalin, *Problems of Leninism*, A. G. Ex. No. 138, R. 1500, at 1508-1509; *Theses and Statutes of the Third (Communist) International*, A. G. Ex. No. 8, R. 1318, at 1328, 1331; all cited by the Board at R. 34 [1865]). Special efforts are to be made to capture the mind of youth for the revolutionary struggle (see numerous references cited by the Board at R. 34-35 [1866-1867]). Many more instances might be cited, but these will suffice to show what the Board meant by the statements petitioner criticizes. Thus the Board's statements, far from being "absurd" (Br. 123), are thoroughly documented by the evidence.

Of course, the Board did not by any means base its "directives and policies" findings exclusively upon the classics of Marxism-Leninism. On the contrary, those works form but

one part of the mass of evidence on which those findings were predicated. It will suffice for present purposes to invite the Court's attention to that portion of the Board's Report wherein the Board reviews the extensive evidence that, throughout petitioner's existence, it has from time to time received directives as to the formulation and carrying out of its policies, programs, and activities from representatives of the Communist Party of the Soviet Union traveling in this country (R. 59-61 [1910-1913]). It was on the basis of this and the other evidence before the Board that the court below observed, with reference to those findings of the Board relating to the directives and policies factor of § 13 (e) (1), that (Op. 71, R. 2148):

* * * Without recapitulating or reciting the multitudinous bits of evidence which underlie these findings, we simply state that in our view a clear preponderance of the evidence supports them. As we have made clear, there is scarcely a dispute as to the period prior to 1940, and there is ample evidence in this record as a whole, when balanced against the proof offered to the contrary, to support their accuracy as to the present.

(b) The non-deviation consideration

The Board found that "the views and policies of [petitioner] throughout its history invariably coincide with the views and policies of the Soviet

Union. Moreover, [petitioner] conforms immediately to each reversal in the Soviet Union's views and policies" (R. 86-[1959]), and concluded that "[petitioner's] views and policies do not deviate from those of the Soviet Union" (*ibid.*). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 79-86 [1948-1959] and is more briefly reviewed in the opinion below at Op. 68-69, R. 2145-2146.

Petitioner does not deny the fact of the identity of its program and policy with that of the Soviet Union. As we have seen (*supra*, pp. 139-140), proof of the fact of identity is all that is contemplated by § 13 (e) (2). Petitioner's discussion of this consideration (Br. 137-144), therefore, is but a further attack on the relevance of non-deviation as one factor tending to establish foreign domination and control—a contention which we have shown to be without merit (*supra*, pp. 139-140).

Petitioner presses its argument by urging that to establish non-deviation within the meaning of § 13 (e) (2) it must be shown that in each instance the view it shared with the Soviet Union, (1) was adopted by it after its adoption by the Soviet Union (Br. 138-140), (2) was itself false or unreasonable and not generally accepted (Br. 140-141), (3) was not "calculated to promote the peace and well-being of the United States" (Br.

141-142), and (4) did not emanate from a common philosophy (Br. 142-144).

The argument is beside the point, for it is obvious that Marxist-Leninist philosophy as implemented by the Soviet Union may have caused petitioner to adopt views on *specific* issues that were not themselves unreasonable and were not inconsistent with the well-being of the United States. Such is to be expected. Proof, therefore, that this was the case with respect to selected issues was, as the Board consistently ruled (R. 836-845, 861-864, 1274-1275), not relevant to the question of non-deviation. The point of non-deviation is not that petitioner's views on every issue were hostile to the interests of the United States, or that they were necessarily evil in themselves.⁶⁷ The point is rather that the fact that a domestic organization, throughout its thirty years' history, has undeviatingly mirrored the views of the foreign power which controls the world Communist movement on every significant aspect of world politics is evidence, to be weighed with all the other evidence, that that foreign power controls the domestic organization and that the domestic organization operates primarily to advance the objectives of the world Communist movement.⁶⁸ Petitioner's repeated asser-

⁶⁷ Petitioner's collateral attempt (Br. 170-173) to attack this aspect of the proof as inconsistent with its right of free speech under the First Amendment is therefore grounded on a mistaken premise.

⁶⁸ Petitioner's repeated assertion, made for the first time in its brief on the merits in this Court, that the Board and the

tion that such an inference is irrational offends common experience. The inference is an entirely reasonable and natural one."

It is true, as petitioner observed in its petition for certiorari, that the fact that two persons "both believe that the sum of two and two is four" (Pet. 73) does not give rise to an inference that one controls the other. It is also true that the fact that "two organizations oppose racial discrimination and segregation" (Br. 140) does not prove that the one is under the other's dominion. But the fact that petitioner, in conformity with the position of the Soviet Union, denounced Fascism in Nazi Germany as a peace menace until the Hitler-Stalin Pact of 1939, following which it about-faced and, with the Soviet Union, hailed the Pact as an outstanding contribution to the peace of the world (see R. 82 [1953]; Op. 68, R. 2145), is evidence of a different character. The evidence

court below were in disagreement as to the evidential effect of the "non-deviation" finding with respect to the ultimate findings (Br. 142, 175-176, 192) is unsupported by the record references it cites (R. 80-86 [1948-1959]; Op. 45, R. 2122) or by anything else in the record. The Board made it abundantly clear, moreover, that its conclusions of fact rested upon the whole record (see R. 132 [2042]), as did the court below (Op. 75-76, R. 2152-2153).

⁶⁰ Cf. 96 Cong. Rec. 14532 (observations on this point by Senator Mundt).

at bar was of the latter type. "Dr. Mosely's⁷⁰ testimony," observed the Board, "traced the continuing stream of international questions, upon which both the Soviet Union and the CPUSA have announced a position. He enumerated some 45 international questions of major import, extending over the past 30 years, with respect to which there was, as revealed by his testimony, no substantial difference between the position announced on each by the Soviet Union or its official and controlled organs and that announced by the CPUSA or its official and controlled organs. * * * [Petitioner's] witnesses were unable to cite a single instance throughout its history where, in taking a position on a question which found the views or policies of the Soviet Union and the United States Government in conflict, the CPUSA had agreed with the announced position of the United States; nor could they show a single instance when the CPUSA had disagreed with the Soviet Union on any policy question where both [petitioner] and the Soviet Union have announced a position" (R. 80 [1948-1949], 85 [1958]).⁷¹

⁷⁰ Dr. Philip E. Mosely, Professor of International Relations at Columbia University and Director of the University's Russian Institute, was the Attorney General's expert witness on "non-deviation" (R. 136 [2048]).

⁷¹ The testimony of petitioner's witnesses, Gates and Flynn, to which the Board referred, appears at R. 1247-1248, 1299-1300. Both have been members of petitioner's National Committee for many years, the former since 1945 (R. 1199), and the latter since 1938 (R. 1275).

Petitioner's contention that the proof of non-deviation failed, because it was not shown as to all of the issues in question that the position held by both the Soviet Union and petitioner was first adopted by the Soviet Union and thereafter announced as the position of petitioner, is equally without substance. As the court below held: "The statutory phrase [non-deviation] refers to identity or coincidence and not to chronological adoption" (Op. 69, R. 2146). Indeed this is the only tenable construction, for Congress could hardly be supposed to have placed upon the Board the impossible task of determining the exact time when a foreign government "*first established*" (Br. 138) each of its positions on political affairs.

Furthermore, contrary to the implications of petitioner's suggestion, a great deal of the non-deviation evidence itself showed that petitioner's adoption of a given position or policy did in fact follow the adoption of that position or policy by the Soviet Union. The sudden reversal of petitioner's attitude *vis-à-vis* Nazi Germany following the Hitler-Stalin Pact of 1939, to which we have already referred (*supra*, p. 227), provides one example of this. Another is petitioner's overnight change of view as to the justness of the war against Germany, which followed the German invasion of the Soviet Union in June 1941 (see R. 82-83 [1953]; Op. 68, R. 2145). A third is

petitioner's abrupt reversal on June 29, 1948, of its attitude toward the Tito Government in Yugoslavia, following the Cominform's and Soviet Union's bitter attack on that Government on June 28, 1948 (R. 83 [1954]; Op 68-68, R. 2145-2146).⁷²

The testimony of petitioner's witnesses, to the effect that all these parallelisms of view between petitioner and the Soviet Union, including the abrupt reversals and re-reversals, were coincidences which sprang from their joint concern for the true interests of the American people, was considered and evaluated by the Board (R. 85 [1958]) and was also taken into consideration by the court below in the performance of its review function (Op. 69-70, R. 2146-2147). In the light of the whole record the conclusion is inescapable that the Board was amply justified in refusing to credit this testimony.

(c) *The discipline consideration*

Petitioner's contention (Br. 150-152) that the Board and court below misconstrued and mis-

⁷² See also, among other incidents referred to in the Board's Report, the evidence relating to the purge trials of Communist leaders in the Soviet Union in 1937 (R. 83 [1954]), the Russo-Finnish War (R. 83 [1954]), the absorption of Latvia, Estonia, and Lithuania (R. 83 [1954]), and the Berlin Blockade (R. 83 [1954-1955]). Petitioner points out that, with respect to certain of the "non-deviation" issues, "the domestic exhibits antedated the foreign exhibits" (Br. 139, fn. 79). But obviously the dates of the exhibits do not necessarily reflect the dates when the views and policies evidenced therein were adopted.

applied the discipline factor of § 13 (e) (6)—*i. e.*, the direction to the Board to consider, in determining whether an organization is a Communist action group, “the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power” of the foreign government or organization controlling the world Communist movement, or its representatives—is in reality nothing more than an attack on the sufficiency of the evidence supporting the Board’s finding on this point. The Board found that “[petitioner’s] principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives” (R. 104 [1993]). The evidence supporting this finding is reviewed in the Board’s Report at R. 98–104 [1982–1993]. The court below reviewed the evidence on this point at Op. 72–73, R. 2149–2150, and concluded that the Board’s finding was supported by “a clear preponderance of the proof” (Op. 73, R. 2150).

As the Court of Appeals observed, “[t]he requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the ‘democratic centralism’ so vigorously insisted upon by Communist leaders in both speeches and documents” (Op. 72, R.

2149),” and “[i]dentification of the Soviet Union as the leader of the world Communist movement is amply shown” (Op. 73, R: 2150).

Petitioner’s argument under this heading illustrates its mistaken insistence, met with throughout its discussion of the evidence, that the evidence under each of the § 13 (e) categories be considered *in vacuo*, unconnected with and unilluminated by any of the other evidence of record. Thus, after devoting more than a page (Br. 151–152) to summarizing specific examples, cited in the Board’s Report, of expulsions of members from its ranks (including a 1951 expulsion for the offense of “urging others to distribute anti-Soviet leaflets”, Br. 152) and other instances of the “iron discipline” exercised over its membership, petitioner argues that none of such evidence can “conceivably support the Board’s finding that petitioner and its members are subject to Soviet discipline” (Br. 152). Not only does this argument ignore the evidence tending to illuminate these incidents, to which the Board refers in discussing this evidence (see, *e. g.*, R. 99–102 [1983–1989], but it ignores all the other evidence of record which inexorably points to the fact that petitioner is Soviet-controlled.

¹³ For an explanation of the principle of “democratic centralism” and how it works as a disciplinary factor among Communists throughout the world, see the Board’s Report at R. 27–28 [1852–1855], 56–57 [1904–1906].

The argument is also based in large measure on petitioner's erroneous assumption, continually reiterated in its brief, that the Board and the court below were required to accept its organizational disaffiliation from the Communist International in 1940 as involving a substantive as distinguished from a merely formal change in its relationship to that body, the Soviet Union, and the world Communist movement. On the contrary, we submit that the Board's (R. 14 [1828-1829]; R. 130 [2038]) and the court's (Op. 64-65, R. 2141-2142) refusal to accept that premise was amply justified by the evidence.

(d) The allegiance consideration

The Board found that "[petitioner's] leaders and its members consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 128 [2034]). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 118-128 [2016-2034]. The court below, remarking that "[t]he evidence on this point is long and in great detail" (Op. 74, R. 2151), reviewed it briefly at Op. 74-75, R. 2151-2152, and concluded that the Board's finding was "amply supported" (Op. 75, R. 2152).

One of the several grounds on which the Board based its finding on this point consisted of petitioner's teachings concerning the necessity and

desirability of forcible overthrow of the United States Government to achieve its ends. After reviewing the evidence on this subject⁴ (R. 118-122 [2017-2023]), the Board observed that "[petitioner's] adherence to and implementation of a concept requiring the overthrow of the United States Government by any means, including force and violence, is completely incompatible with, and the exact antithesis of, allegiance to the United States" (R. 122 [2023-2024]). In attacking these findings, petitioner (Br. 154-158), asserting that the Board reached its conclusion that petitioner advocates the violent overthrow of this Government "primarily from excerpts from the *Communist Manifesto* and the writings of Lenin and Stalin", argues that this Court, in *Schneiderman v. United States*, 320 U. S. 118, "after a study of the same texts", concluded that "adherence to Marxism-Leninism is not inconsistent with attachment to the principles of the Constitution and being well-disposed toward the good order and happiness of the United States" (Br. 155). The contention does not bear analysis.

In the first place, the Board's finding with respect to petitioner's teachings concerning the use of force and violence does not rest "primarily", as petitioner asserts, on the literature of Marxism-Leninism. It was based as much on the personal testimony of witnesses, who had been members of petitioner, recounting their individ-

ual experiences (R. 121 [2022]). That testimony established that petitioner "in reality advocates the overthrow of the government of the United States by force and violence" (*ibid.*). The membership of these witnesses "spanned the entire existence of the Party until January 1951" (*ibid.*). Their positions in the Party "ranged from high offices to rank and file Party membership" (*ibid.*). Included among them was a former General Secretary of the Party (Tr. 1698), the highest executive position in the organization (Tr. 1697), and a former managing editor of the *Daily Worker* (R. 1127), the Party's official organ. Truly, as the Board observed, these witnesses "were in a position to know whereof they spoke" (R. 121 [2022])."

"Petitioner's attempt to disparage the Board's reliance on the testimony of these witnesses for its force-and-violence finding (Br. 155, 205-207) does not avail it. The Board cited the testimony of ten witnesses for this proposition (R. 121 [2022]). Petitioner concentrates its attack on four of these witnesses (see Br. 205). It alleges that two, both of whom concededly so testified on direct examination (Br. 205), retracted their testimony on cross-examination (Br. 155, 205-206); that a third gave no testimony at all on the subject (Br. 155, 206); and that the fourth gave conflicting testimony (*ibid.*). The record does not bear out petitioner's contentions. There was no retraction in fact on the part of the two witnesses whom petitioner alleges to have done so (see R. 501-506 (Honig); R. 649, 675-678 (Johnson)); the witness who allegedly gave no testimony on the subject, Meyer, did in fact give testimony which, fairly construed, warranted the Board in citing it (see R. 729, 730-731); and

Furthermore, the literature of Marxism-Leninism to which the Board referred in its Report was not limited to the literature which this Court considered in the *Schneiderman* case. In *Schneiderman*, the relevant literature was that which had been published prior to 1927, the date of Schneiderman's naturalization (320 U. S. at 148). The writings which were published after that date, the Court said, were "entitled to little weight because they were published after the critical period" (*id.* at 151-152). Here, on the other hand, the Board had before it all the significant literature of Marxism-Leninism published up to the time of the hearings herein, which included a span of more than twenty years beyond the "critical period" of the *Schneiderman* case. Even on the basis of the literature which this Court considered in *Schneiderman*, the Court did not question that it could reasonably have been found that "the Communist Party in 1927 actively urged the overthrow of the Gov-

there was no real conflict in what the fourth witness said on the subject (see R. 1053-1055). Petitioner's allegation that the Board's Report "conceals" testimony by government witness Lautner favorable to it on the force-and-violence issue (Br. 267, 155) is without record support. Lautner gave no such testimony, but on the contrary characterized petitioner's latter-day statements (R. 979-981, 983-984, 1696, 1705) as "self-serving" (R. 979) and as "poppycock" (R. 985, 997), because they were "in contradiction to the basic principles of Marxism-Leninism" (R. 975) to which petitioner adhered (R. 1695).

ernment by force and violence" (320 U. S. at 153).⁷⁵ The literature received in evidence by the Board in this case, on the other hand, a few "illustrative" passages from which the Board quotes in its Report (R. 118-119 [2017-2020]), leaves no doubt that force and violence was and is advocated as a means of overthrowing all "bourgeois" governments, including that of the United States. Significantly, the two works from which the Board quotes for "illustrative" purposes—Stalin's *Problems of Leninism* (1934) and *Foundations of Leninism* (1932)—were not even in evidence in the *Schneiderman* case.⁷⁶

2. *The Board's finding that petitioner is a Communist-action organization is based upon proof as to its current practices and activities as illuminated by its past history*

Petitioner's contention (Br. 160-170) that "the order of the Board and the decision below violate the Act because they rest on alleged conduct of the petitioner which, if it ever took place, had

⁷⁵ As the Court observed in *Schneiderman*, the issue there was not whether the Communist Party in 1927 had urged the overthrow of the Government by force and violence, but rather whether the Government had sustained its burden of proving, by "clear, unequivocal, and convincing" evidence, that Schneiderman himself was lacking in attachment to the Constitution at the time of his naturalization (320 U. S. at 153-154).

⁷⁶ The dates given are the dates of the first editions published in the United States. According to petitioner, these works had been written in 1926 and 1924, respectively (Br. 198, n. 116).

been discontinued prior to enactment of the Act" (Br. 160) is without merit. The finding that petitioner is a Communist-action organization and the order directing it to register as such are based on petitioner's current practices and activities as illuminated by its entire past history.

"In reaching our conclusion herein," the Board said (R. 130 [2038])—

we have considered and weighed commensurately, therefore, such pre-Act evidence as reasonably tends to establish or illuminate the present nature, activities, character, and status of [petitioner] in connection with the issues presented for decision: * * *

As the Supreme Court of the United States has stated, "present events have roots in the past." This is particularly true in this proceeding where consideration thereof brought to light facts, and raised presumptions and inferences tending to show [petitioner's] true current purpose, as well as the nature of its present conduct. We have been able to trace [petitioner's] operations over more than thirty years into the present and have found that at no time during this period has [petitioner] changed its fundamental objectives, or its nature and purpose. There are no protestations of repentance and reform; and, though [petitioner] continually points to its "disaffiliation" from the Communist International, for example, as a severance of its relation-

ship with international Communism, a study of its pre-Act existence properly enabled us to adjudge that this was, at most, only a superficial act designed in the interest of domestic political expediency to circumvent adverse legislation (Voorhis Act).

That an organization's past history is a relevant and important consideration in determining its present character and status cannot be doubted. See *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 703-706; *United States v. Oregon Medical Society*, 343 U. S. 326, 333; *United States v. Reading Co.*, 253 U. S. 26, 43-44; *Standard Oil Co. v. United States*, 221 U. S. 1, 74-76; *United States v. Dennis*, 183 F. 2d 201, 231 (C. A. 2), affirmed, 341 U. S. 494.⁷ It is both good sense and good law to use the past to illuminate the present. As the court below said (Op. 63-64, R. 2140-2141):

The past is clearly pertinent to the present nature of a person or an organization. Surely a person's education and experience are pertinent to his present nature. The same is true of an organization. As a matter of fact it is rarely, if ever, possible

⁷ Petitioner's attempted distinction of the *Dennis* case (Br. 168-169, fn. 98) is unsound. In the present case as well as in *Dennis*, acts and events occurring prior to the critical period were treated as "*media concludendi*" as distinguished from "the factum itself" (183 F. 2d 201, 231). This is made clear by the passage from the Board's Report quoted in the text, *supra*, pp. 238-239:

to prove present nature by some instantaneous, contemporaneous fact, totally ignoring the whole of the past. Not only is the past clearly pertinent, it may be quite material to a determination of present nature. Whether it is material depends upon whether there is affirmative evidence of a departure from the established past. In the ordinary affairs of life and in ordinary litigation, if a person or an organization is shown to have had over many years a certain policy and program, and no more is shown, the conclusion is clearly indicated that he or it has the same policy and program in the present.

The Board did not, as petitioner contends (Br. 168), rest its decision upon any "vague presumption of 'continuance'." It did not, that is, having found certain conditions to have existed in the past, merely assume that those conditions continued to exist without any further proof. The Board specifically stated that "the record contains ample post-Act evidence which, when illuminated, supports our finding" (R. 130 [2039]).

This post-Act evidence is far from being as "scanty" (Br. 168) as petitioner would have it. The fact that it requires three pages of petitioner's brief (Br. 163-166) merely to itemize the post-Act evidence whose insufficiency it insists upon is convincing proof to the contrary. Neither is this evidence "absurdly irrelevant and imma-

terial" (Br. 166), as petitioner suggests. Petitioner recognizes, for example, that the "non-deviation" evidence relates to the post-Act period quite as much as to the preceding thirty years of its history (Br. 165). It does not avail for petitioner to brush this aside on the ground that all the nondeviation evidence is "irrelevant" (*ibid.*). We have already shown that such evidence is far from irrelevant (*supra*, pp. 139-140, 224-230). Nor can petitioner, by castigating some of the witnesses who gave post-Act testimony as "informers" and "provocateurs", and disparaging their testimony as "discredited" (Br. 164), expunge their testimony from the record. See *infra*, pp. 244-245, 251-257. Assaying the credibility of witnesses was the Board's function.

Neither is petitioner's argument aided, to cite but one more example, by its including among the "scanty" and "irrelevant" items of post-Act evidence the fact that "some of [its] present officials held positions in the Communist International prior to 1940, and visited and, in some cases, studied in the Soviet Union before 1940" (Br. 164). The evidence to which petitioner refers is expressed more pointedly in the language of the Report (R. 20 [1840]):

We further find that a substantial number of [petitioner's] present leaders, including Foster, Stachel, Bittelman, Green, Winter,

and Williamson, have been to the Soviet Union on numerous occasions on Party business and have been indoctrinated and trained in the Soviet Union on Russian strategy and policies. These leaders have taught in Party schools, written for the Party press, and spoken at Party meetings, on various phases of Marxism-Leninism, including the leading position of the Soviet Union, the concept of proletarian internationalism, and the necessity of revolutionary overthrow of imperialist nations, particularly the United States. We find that Foster and these other leaders of [petitioner] have accepted the views and policies of the Soviet Union and have carried such views and policies into [petitioner], making them the views and policies of [petitioner].

Petitioner's argument that the post-Act evidence is of but trifling significance is further refuted by the fact that of the 507 government exhibits admitted in evidence, 56 post-dated the Act and were extensively used as the evidential bases of many particular findings in the Board's Report.⁷⁸ Five of the 19 former members of

⁷⁸ To illustrate, we cite parenthetically after each of the exhibits in the following list the page or pages of the Board's annotated Report at which the exhibit is referred to: Ex. 268 (R. 1955-1956); Ex. 276 (R. 1955); Ex. 283 (R. 1956); Ex. 314 (R. 1955); Ex. 315 (R. 1955); Ex. 316 (R. 1955); Ex. 317 (R. 1955); Ex. 318 (R. 1956); Ex. 319 (R. 1956); Ex. 320 (R. 1956); Ex. 321 (R. 1956); Ex. 322 (R. 1956); Ex.

petitioner who testified for the Government were members during the post-Act period, several as late as 1952 (see R. 134-135 [2045-2048]); and all of these testified extensively concerning the post-Act period. Six others² were members up until a time—1949 or 1950—immediately preceding passage of the Act (*ibid.*). Not one of these witnesses indicated that petitioner's character and nature had undergone any change in the post-Act period. Their testimony was, rather, entirely to the contrary. Petitioner's own witnesses, as petitioner itself points out, similarly insisted that the Party was the same sort of organization at the time of their testifying as it had always been, or at least as it had been since they came to know its innermost workings as members of its National Committee, which was in 1938 in the case of Miss Flynn and 1945 in the case of Gates (see Br. 167-168, including fn. 96). Petitioner does not even now claim to have changed its essential character and nature since the Act became law. Its whole position in this case has been that it has never been—or at

323 (R. 1956, 2033); Ex. 376 (R. 1884, 1900, 1927, 1929, 1935, 1939, 1943, 1967, 1981, 1987, 2029); Ex. 378 (R. 1884, 1909, 1927, 1929, 1939, 1943); Ex. 379 (R. 1942); Ex. 416 (R. 1882); Ex. 451 (R. 1899A); Ex. 455 (R. 1899A); Ex. 467 (R. 1899A); Ex. 468 (R. 1899A, 1900); Ex. 477 (R. 1866, 1900, 1937, 2031); Ex. 479 (R. 1939); Ex. 480 (R. 1900); Ex. 488² (R. 1899A, 1900, 1955); Ex. 489 (R. 1900, 2022); Ex. 493 (R. 2029); Ex. 495 (R. 1899A).

least that it has not been since 1940—an organization of the type this Act defines.” The Government’s evidence overwhelmingly established the contrary—that the petitioner was and is such an organization.

A theme which recurs throughout petitioner’s brief, but which it states with particular emphasis in the present context, is that the Board paid too little heed to the testimony of its witnesses Flynn and Gates. After pointing out that these witnesses gave testimony which in large measure amounted to bland conclusory denials that petitioner does any of the things referred to in § 11 (e) of the Act (Br. 167–168), petitioner complains that the Board “dismissed this uncontradicted testimony with the bald statement that it did not establish the facts ‘to our satisfaction’ ” (Br. 168). The Board, however,

⁷⁰ Indeed, even if the record showed sudden protestations of reform upon the passage of the Act, *United States v. Oregon Medical Society*, 343 U. S. 326, teaches that such protestations should be scrutinized with care before being accepted at face value. “When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws,” the Court said, “courts will not assume that it has been abandoned without clear proof. * * * It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption” (*id.* at 323). See also *Independent Employees Assn. v. National Labor Relations Board*, 158 F. 2d 448, 455 (C. A. 2), certiorari denied, 333 U. S. 826.

set forth in its Report the considerations which it took into account in weighing the testimony of these witnesses (R. 3 [1808]) as well as the factors which it took into account in weighing the contrary testimony of the Attorney General's witnesses (*ibid.*). It was for the Board to weigh this testimony, as it did, in the light of the whole record and to make findings according to the preponderance of the probative evidence of record. The Board's conclusion that petitioner's witnesses did not establish that petitioner's character and objectives had changed since the passage of the Act (R. 130 [2038]) was fully supported by the record. Moreover, as the Board found, "the record contains ample post-Act evidence which, when illuminated, supports our finding" (*ibid.*).

3. The Board's conclusion that there exists a world Communist movement, having the characteristics described in § 2 of the Act, while not essential to the validity of its order, was in any event supported by the preponderance of the evidence

Petitioner contends (Br. 193-199) that the Board erred in finding from the evidence before it that "there exists a world Communist movement substantially as described in Section 2 of the Act" (Br. 193; R. 9 [1819]). This contention is based, however, as petitioner recognizes (Br. 194, 199), on the assumption that the existence of a world Communist movement as found by Congress

in § 2 of the Act, and having the characteristics described in that section, was subject to redetermination in the administrative proceeding before the Board. We argued above that this assumption is untenable—the existence of this world movement is one of the legislative facts found by Congress in the Act itself (*supra*, pp. 126–127). In that connection, we answered petitioner's contention that the making of this finding by Congress renders the Act unconstitutional as “fiat legislation” (*supra*, pp. 123–129). The court below was correct, therefore, in stating that it was unnecessary to redetermine the existence of what Congress had found in the Act to exist (Op. 56, R. 2133). *Galvan v. Press*, 347 U. S. 522, 529; *Carlson v. Landon*, 342 U. S. 524, 535–536.

The Board, it is true, deemed it “desirable” to make an independent finding, “based upon the evidence in this proceeding,” concerning “the world Communist movement, its characteristics and the identification of the leadership of such movement” (R. 4 [1810]). Accordingly, it reviewed such evidence (R. 4–9 [1810–1819]) and found on the basis of it that there exists such a world movement, substantially as described in § 2 (R. 9 [1819]). Similarly, the court below, notwithstanding its holding that it was unnecessary to redetermine the existence of this movement, undertook, because the Board had made such an independent finding, to review the evidence (Op. 56–61, R. 2133–2138), and concluded

that the finding was "supported by a clear preponderance of the evidence" (Op. 61, R. 2138). We submit that this conclusion is correct.

The evidence established far more than the presence of what petitioner describes as "Communist parties in various countries which base their program and activities on a common economic and political outlook, and work toward the ultimate achievement of a common social goal—a universal, classless, stateless society" (Br. 199). Petitioner's assertion that all that the court below found was that there is a world Communist movement in that sense (*ibid.*) is a serious distortion of what the court actually found the evidence to show. The court, while observing that the professed "ultimate objective" of the world Communist movement is a worldwide "classless, stateless society" (Op. 60, R. 2137), observed also that "[i]n the interim the program calls for a small, hard core of revolutionaries, formed into a disciplined Party in every country;" that "[t]his Party is to attain control of the government of its country for the purpose of destroying its present form;" and that "[i]n this interim operation the Party must be ruthless" (*ibid.*).

What this "ruthlessness" is to consist of is also described by the court. In the achievement of the "dictatorship of the proletariat," the

court stated, Stalin, the heir of Lenin and the recognized leader of the world movement until his death, "stressed the necessity for violence" (Op. 57, R. 2134). The court quoted Stalin's statement in his *Foundations of Leninism* (A. G. Ex. 121, R. 1427, at 1434) to the effect that Lenin was "right in saying" that the "proletarian revolution" would be "impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a new one * * *" (Op. 58, R. 2135). The court then proceeded to quote passages from other authoritative works among the classics of world Communism (Op. 58-60, R. 2135-2137), all in evidence in this case, and all tending to prove beyond a doubt that the world Communist movement is indeed, substantially, as § 2 of the Act describes it, "a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

Petitioner assumes that, because its witness Aptheker testified that a "dictatorship of the proletariat" would be, and as practiced in the Soviet Union is, democratic government in its

purest form (see R. 1266-1267, 1306-1309, 1310),⁸⁰ the Board was bound to accept his testimony and to make findings with respect to this objective of the world Communist movement which would in effect adopt his views (Br. 196-198). The Board, however, was under no such compulsion, particularly when it had before it the following more authoritative views as to what the dictatorship of the proletariat is, how it should arise, and how it should operate in practice (Stalin, *Problems of Leninism*, A. G. Ex. 138, R. 1500, at 1505-1507):⁸¹

"In order to win the majority of the population to its side," Lenin continues, "the proletariat must first of all overthrow

⁸⁰ Among other things Aptheker testified that freedom of religion and of the press is enjoyed in the Soviet Union (R. 1308). He stated that when Communists succeed in getting control of a country opposing political parties are allowed to continue to exist and publicize their views as long as "different classes" continue to exist (R. 1306); that, indeed, when the Communist Party gets into a position of leadership in a country it willingly shares its leadership with other parties (*ibid.*).

⁸¹ This work was described by witness Meyer as one of the "central" textbooks used in Communist Party schools in the United States (R. 689; see Report of the Board, R. 43 [1880-1881], fn. 30). Though written in 1926 (Br. 198, fn. 116), the English translation was first published in the United States in 1934 (R. 1500). It was one of the "classics" studied by witness Lautner at the Party's National Training School in 1941 (R. 943-944, 946, 949) and used by him as a textbook and sourcebook when he himself became a teacher in the Party's schools from 1947 till his expulsion in 1950 (R. 950-952).

the bourgeoisie and seize state power and, secondly, it must introduce Soviet rule; smash to pieces the old state apparatus, and thus at one blow undermine the rule, authority and influence of the bourgeoisie and of the petty-bourgeoisie compromisers in the ranks of the non-proletarian toiling masses. * * * * *

Such are the characteristic symptoms of the proletarian revolution.

* * * * *

Replying to those who confuse the dictatorship of the proletariat with "popular," "elected" and "non-class" government, Lenin states:

"The class which has seized political power has done so conscious of the fact that it has seized power alone. This is implicit in the concept of the dictatorship of the proletariat. This concept has meaning only when one class knows that it alone takes political power into its own hands, and does not deceive itself or others by talk about popular, elected government, sanctified by the whole people." * * *

* * * * *

Pointing to one of the most important aims of the dictatorship, namely the suppression of the exploiters, Lenin states:

"The scientific concept, dictatorship, means nothing more nor less than power which directly rests on violence, which is not limited by any laws or restricted by any absolute rules * * *. Dictatorship

means—note this once and for all, Messrs. Cadets [ed. note: “The Constitutional Democrats”]—unlimited power, resting on violence and not on law. * * * * *

In short, the record amply supports the Board's conclusion that there exists a world Communist movement substantially as described in § 2 of the Act.

C. THE BOARD'S FINDINGS ARE SUPPORTED BY RELEVANT, COMPETENT EVIDENCE

In a further attack on the findings of the Board, petitioner, at pages 199–211 of its brief, makes an intemperate attack on the Attorney General's witnesses as “discredited,” and charges that the Board's findings are based on a “misrepresentation of the evidence.” Petitioner's charges, which touch relatively minor aspects of the proof, are insubstantial and in many instances distort the record, as is apparent when the materials alleged to support its assertions are examined.

Petitioner concentrates its attack on the use by the Attorney General of informers. Of the twenty-two witnesses who testified for the Attorney General, nineteen were former members of petitioner and nine had joined or rejoined petitioner as the result of conferences with the F. B. I. (R. 134–136 [2045–2048]). As this Court has noted, the use of informers involves issues of credibility, not of law. There is no policy or rule

of evidence which forecloses use by the Government of otherwise relevant evidence supplied by informers, false friends, or the like. *On Lee v. United States*, 343 U. S. 747, 756-758; *Caminetti v. United States*, 242 U. S. 470, 495-496; *United States v. Dennis*, 183 F. 2d 201, 224-225 (C. A. 2), affirmed, 341 U. S. 494. The reason for the rule is illustrated by the requirements of public policy in a case such as this where the petitioner is an organization which endeavors to operate covertly and, in the nature of things, the available witnesses are persons who were formerly members of that organization.⁸²

Issues of credibility are uniquely issues to be resolved by the triers of fact who have the advantage of hearing the witnesses and observing their demeanor while testifying on both direct and cross examination. The record shows that all of the Attorney General's witnesses were subjected to extensive and searching cross examination on matters going both to the substance of their testimony and to issues of credibility. Petitioner urged before the panel its objections to the character of certain of these witnesses, and renewed these objections in its exceptions to the recommended report, in its brief to the Board, and on

⁸² Cf. testimony of Assistant Attorney General Tompkins in Hearings before the Subcommittee of Committee on Appropriations, H. R., 84th Cong., 1st sess., on Department of Justice appropriations for 1956, pp. 308-309.

oral argument before the Board.⁸³ The report of the Board makes it clear that it carefully weighed, as was its duty, these contentions. Thus the Board explicitly stated (R. 3 [1808]):

In making our findings herein, we have considered and weighed all the evidence of record. In weighing Petitioner's [i. e., the Attorney General's] evidence, we have considered that certain of its witnesses fall into the category of "informers" and we have scrutinized their testimony accordingly; we have considered and resolved the inconsistencies in the testimony of certain of Petitioner's witnesses; we have considered the testimony of Petitioner's witnesses against the background of their various organizational positions and activities in the CPUSA which afforded the sources of their knowledge; and we have had the benefit of the Panel's observation of their demeanor while testifying. Viewing these considerations in the light of the whole record, we find no basis for disregarding the substance of their testimony.

We have likewise weighed and evaluated Respondent's evidence, taking into account that each of its three witnesses has a vital personal interest in the outcome of this

⁸³ We deal *infra*, pp. 277-285, with the issues raised by petitioner with respect to the testimony of Crouch, Johnson and Matusow. As we there point out, there is no reasonable possibility that the Board's ultimate findings of fact would be different even if the testimony of these witnesses were completely ignored.

proceeding; that in nature and substance the direct testimony of two of its witnesses amounted, in a large degree, to conclusory denials of the allegations of the petition and the criteria of Section 13 (e) of the Act; that important members of Respondent, whom Petitioner's witnesses had identified as being parties to, or present at, conversations which were detrimental to Respondent herein, were not called to rebut such testimony; and, that the Hearing Panel, having observed the demeanor of its witnesses as they testified, had some misgivings about certain of them.

Petitioner gives copious citations to the record which, it intimates, support the charges it makes. A few examples will demonstrate with what caution petitioner's assertion of record support must be evaluated. In some instances, the citations do not support the assertions made; in others, petitioner has failed to cite other portions of the record which are necessary to an evaluation of the incidents to which reference is made.

Thus petitioner, in its general attack on the asserted low morals of certain of the witnesses, states that they informed on relatives and friends and on persons whom they, "while agents of the F. B. I.," had induced to join petitioner (Br. 201). But petitioner fails to note that these same witnesses testified that recruiting was a task required of them by the Party (Markward, R./

751-752; Cummings, Tr. 11011, 11013); that they never recruited Party members at the request or suggestion of the F. B. I. (Markward, R. 751; Cummings, Tr. 11011-11014; and cf. Tr. 10982-10983, 10990-10991); and that in each instance the F. B. I. was informed of the circumstances surrounding the joining of the Party by the individuals concerned (Markward, Tr. 7814; Cummings, Tr. 11011, 11014).

An analysis of petitioner's attack on the Board's finding that its disaffiliation from the Communist International in November 1940, "did not alter in any substantive way" petitioner's relationship with the International (Br. 202-203) will illustrate the insubstantial nature of petitioner's further attack on specific findings of the Board. Petitioner states that the "only evidence" which can support this finding was testimony by Crouch (Br. 202). But, as appears from the Board's report, it relied also on testimony of Meyer and Lautner (R. 14 [1828-1829]). Petitioner charges that the Board ignored the testimony of its witness Miss Flynn on this point (Br. 203). But, on the contrary, at R. 14 [1829], the Board quoted Miss Flynn's testimony on cross-examination to the effect that "we were not disaffiliating in anger * * *. It was, you might say, a friendly divorce." The Board did not ignore, but evaluated Miss Flynn's testimony. Moreover, petitioner fails to invite the Court's attention to the fact that, as observed by the court below

(Op. 64, R. 2141), petitioner's disaffiliation from the Communist International was, by its own formal admission, "for the specific purpose of removing itself from the terms of" the then recently enacted Voorhis Act (C. P. Ex. 13, p. 50). This, of course, was highly relevant to the question whether the purported disaffiliation constituted a termination of relations in fact, or whether it was a sham maneuver. We do not stop to discuss petitioner's assertion that the report "conceals" the fact that Crouch had never previously testified to a certain statement of Browder on this matter (Br. 203), for there was no showing that Crouch's past silence on the point occurred under circumstances requiring that such testimony be given (see Tr. 5543-5601). Petitioner's final assertion that Crouch's testimony was directly contradicted by that of Lautner. (Br. 203) is not sustained by the record. On the contrary, Lautner testified that the Party's decision to disaffiliate from the International would "in no way affect the question of proletariat internationalism, proletariat solidarity and fraternal relationship between the parties" (R. 991). Even petitioner's witness, Miss Flynn, while denying that Browder had said that the Party's relations with the International "would remain exactly as in the past," did testify that Browder had "said something that

might be misinterpreted or deliberately perverted to mean something like that" (R. 1285).

In short, petitioner's attack on the Board's witnesses and on certain minor aspects of the proof is misleading in its use of the record and is *in toto* insubstantial when weighed against the overwhelming proof that, as the Board found and the Court of Appeals affirmed, petitioner is a Communist-action organization. The fact that the Board, by and large, resolved factual conflicts in favor of the Attorney General and rejected the contrary testimony of petitioner's witnesses reflects the character of the proof adduced, and does not, as petitioner would have it (Br. 210-211), impugn the integrity or competence of the Board. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 337 U. S. 656, 658-660; *United States v. Yellow Cab Co.*, 338 U. S. 338, 340-341..

D. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S ORDER, NOTWITHSTANDING THE FACT THAT IT MODIFIED TWO OF THE SUBSIDIARY FINDINGS OF THE BOARD

Petitioner contends (Br. 175-177) that "the court below, having invalidated key findings of the Board, erred in not remanding the case for administrative redetermination" (Br. 175). Petitioner asserts that the court below "struck" (Br. 175) "two of the key findings" (Br. 176) and held that the Board had given "an erroneous application" to a third (*ibid.*), so that there were

only ~~five~~ findings which survived" (Br. 177).

At the outset, the nature of the rulings of the court referred to by petitioner should be understood. With respect to the Board's subsidiary finding (corresponding to § 13 (e) (5) of the Act) to the effect that petitioner "reports to the Soviet Union and its representatives" (R. 98 [1982]), the Court of Appeals said (Op. 72, R. 2149):

* * * There is little doubt about these reports having been made when the Party was a member of the International; such was one of the "conditions" of the International. There is some doubt that a preponderance of the evidence supports the broad conclusion that the Party "reports to the Soviet Union and its representatives." Such a conclusion seems to imply constant, systematic reporting as of now. The evidence indicates instances, as in the cases of Eisler and Peters. On this record we would strike this finding as phrased. There is a preponderance of evidence, we think, to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union.

The other "key finding" of the Board to which petitioner refers was its subsidiary finding relating to "secret practices" of petitioner (corresponding to § 13(e) (7)). After reviewing the long history of such practice. (R. 105-116 [1993-2012]) and after considering the evidence relating

to their "purpose" (R. 116-117 [2012-2015]), the Board concluded that (R. 117 [2015]):

* * * the secret practices undertaken by [petitioner] are for the purpose of concealing the true nature of the Party and promoting its objectives. We cannot accept [petitioner's] contention that its secret practices are merely devices utilized to protect the rights and liberties of its members.

With respect to this finding the Court of Appeals said (Op. 73-74, R. 2150-2151):

This question, whether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the objectives of the Party, is a nebulous one. The two purposes may well overlap. In so far as protection of its members from public identification as Communists also promotes the objectives of the Party, both purposes could exist together. In a doubtful situation such as that on this point, we strike the finding as to purpose. At the same time we are of opinion that the Party's view of the limited purpose of secrecy is not shown by a preponderance of the evidence. On this point we conclude simply that a defined purpose is not proven.

Petitioner's further assertion that the court below held that the Board had given "an erroneous

application" to the non-deviation finding (Br. 175-176) is, as we have previously pointed out (*supra*, pp. 226-227, fn. 68), without record support.

It thus appears, contrary to petitioner's assertions, that the court below *modified* two of the Board's *subsidiary* findings, while affirming the other six as "supported by a preponderance of the evidence" (Op. 76, R. 2153). And, what is decisive here, the court below further found that the Board's ultimate finding of fact—that petitioner "is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement * * *; and * * * operates primarily to advance the objectives of such world Communist movement" (R. 132 [2042])—was likewise itself fully supported by the preponderance of the evidence (Op. 75-76, R. 2152-2153).

As we have seen (*supra*, pp. 132-133), the statutory considerations of § 13 (e) are in no sense tests or criteria, the fulfillment of any one of which would suffice to establish that an organization met the Act's definition of a Communist-action group. It would be equally erroneous, however, to assume that the Act requires affirmative findings under each of the § 13 (e) categories before an organization can be held to fulfill the § 3 (3) definition of a Communist-action group. Section 13 (e) simply establishes certain cate-

gories of proof which Congress identified as relevant to the decisive issue presented by the § 3 (3) definition. Here, the subsidiary findings which the court below affirmed as established by a preponderance of evidence, together with the other findings as modified, abundantly supported the ultimate and controlling finding that petitioner is a Communist-action organization, pursuant to which the Board ordered it to register under the Act. Under the circumstances, remand of the case to the Board for redetermination of that issue was not required and would have served no useful purpose. The court below correctly affirmed the Board's order. *National Labor Relations Board v. Newport News Co.*, 308 U. S. 241, 247; *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 205 F. 2d 131 (C. A. 1), certiorari denied, 346 U. S. 887; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 169 F. 2d 881, 883 (C. A. D. C.), certiorari denied, 335 U. S. 854. Cf. *Universal Camera Co. v. National Labor Relations Board*, 340 U. S. 474, 488.⁸⁴

⁸⁴ The cases relied on by petitioner (Br. 176-177) are distinguishable from the case at bar. This is not a case in which it is unclear from the record on just what evidence the administrative findings are based (*National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 479); nor one in which the administrative order would be sustainable if based on grounds which the record shows were not the actual grounds on which it was based (*Securities and Ex-*

IV

PETITIONER WAS NOT DENIED A FAIR HEARING
BEFORE THE BOARD

Petitioner contends that it was denied a fair hearing before the Board because of alleged "extra-legal pressures" on it on the part of the Senate Judiciary Committee to decide against petitioner (Br. 178-183) and because of alleged prejudice against it on the part of the two members of the hearing panel which heard the evidence and made the recommended decision (Br. 183-185). We submit that the contention is without merit in either respect.

A. THERE IS NO EVIDENCE THAT THE BOARD WAS SUB-
JECTED TO "EXTRA-LEGAL PRESSURES" ON THE PART OF
THE SENATE JUDICIARY COMMITTEE OR ITS CHAIRMAN

On April 23, 1951, a hearing panel, consisting of three members of the Board, commenced the taking of testimony in this case. The members of this panel, Messrs. LaFollette and Brown and Dr. McHale (as well as the other two members of the Board, Chairman Richardson and Mr. Coddaire) were at that time serving under recess ap-

change/Commission v. Chenery Corp., 318 U. S. 80, 94-95); nor one in which the reviewing court modified an administrative order (*Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17, 20-21); nor one in which the administrative findings are "so shrouded in doubt" that the basis of the agency's action is not determinable (*Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U. S. 626, 634-635).

pointments (see *infra*, pp. 285-307). On June 6, 1951, Chairman Richardson resigned from the Board because of ill health (*First Annual Report, Subversive Activities Control Board*, p. 5). On July 30, 1951, the Senate Judiciary Committee, which had the remaining nominations under consideration, reported favorably on the nominations of Brown, McHale, and Coddair, but took no action on that of Mr. LaFollette, the chairman of the panel. The three nominees reported on favorably were confirmed by the Senate ten days later, on August 9, 1951 (97 Cong. Rec. 9702). The LaFollette nomination died in committee and his recess appointment expired with the adjournment of the First Session of the 82d Congress on October 20, 1951, at which time Mr. LaFollette ceased to serve (R. 1). The hearing continued before the remaining two members of the panel, Brown and McHale, ending July 1, 1952 (R. 1; 2).

Based upon the foregoing facts, petitioner argues that "for many months during the pendency of the administrative proceeding,⁸⁵ the tenure of the Board members was subject to the pleasure of the Senate Judiciary Committee, whose chairman [Senator McCarran] had the

⁸⁵ Actually, of the 14 months during which the hearings lasted, it was, as we have seen, only during the first 3½ months that the two members of the hearing panel who sat throughout the hearings and participated in the final decision (Brown and McHale) had not been confirmed.

power to block confirmation ~~is~~ their conduct of the proceeding did not conform to his wishes" (Br. 179). Because of this, petitioner argues, the members were necessarily influenced by fear of nonconfirmation and the consequent loss of their positions during the period prior to July 30, 1951, when the Senate Committee reported favorably on their nominations.

Preliminarily, it should be observed that, since the hearings did not end until July 1, 1952 (R. 2), nearly a year following the favorable report by the Senate Judiciary Committee, and since the recommended decision of the hearing panel was not issued until October 20, 1952 (R. 2), four months after that, and since the final order of the Board was not entered until April 20, 1953 (R. 138), six months later still, it is difficult to understand how, even given petitioner's assumptions, the alleged pressure emanating from the Senate Judiciary Committee and its chairman could be said to have affected the decision and order of the Board, which alone is in issue here.

Basically, petitioner's argument consists of an indictment of recess appointments as such. In every case in which the President requests an official to perform statutory duties without prior Senate confirmation of his appointment, the appointee is in the identical position of the Board members in this case. Yet Article II, Section 2, Clause 3 of the Constitution makes specific pro-

vision for recess appointments. It is apparent that the drafters of the Constitution must have considered that on balance it was preferable to have an officer serve before confirmation rather than to require that a position remain vacant whenever the Senate was in recess and therefore not able to pass upon the appointment promptly. It can do the petitioner no good to quarrel with that decision; it is written into the Constitution.

To buttress its argument, petitioner argues not only that members of the Board were in a position where influence might have been exerted, but that it was in fact exerted. This, however, finds no support in the record. There is no evidence that the Senate Judiciary Committee, its chairman, or any of its members attempted to apply pressure to the Board. No action by any member of the Board gives evidence that he was acting under duress or that he was ready to compromise his oath of office because of fear that he might not please Congress.

This Court is asked to pile inference on inference to impute dishonesty to both the Senate Judiciary Committee and the Board. This the courts have refused to do. *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 700-703; *United States v. Morgan*, 313 U. S. 409, 420-421; *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589 (C. A. 7);

National Labor Relations Board v. Weirton Steel Co., 135 F. 2d 494, 497-498 (C. A. 3); *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. 2d 215 (C. A. 8); *National Labor Relations Board v. Air Associates*, 121 F. 2d 586, 588-591 (C. A. 2); *Press Co. v. National Labor Relations Board*, 118 F. 2d 937, 940 (C. A. D. C.), certiorari denied, 313 U. S. 595. On the contrary, courts have indulged the presumption that administrators are "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" (*United States v. Morgan, supra*, 313 U. S. at 421), and that they can resist any unfair attitudes expressed to them. *National Labor Relations Board v. Air Associates, supra*, 121 F. 2d at 588.

Petitioner points to testimony that, before the members' confirmation, three of the Attorney General's witnesses had had conversations with a Mr. Mandel, a former member of the Communist Party (R. 300), who was then employed by the subcommittee on Internal Security of the Senate Judiciary Committee (Br. 180-181). Gitlow had been a personal friend of Mandel's for nearly thirty years (R. 300); he testified that whenever he came to Washington he discussed matters of mutual interest with him (R. 295). Kornfeder had likewise known Mandel for thirty years (R. 347). Crouch too had known Mandel from their

Party days (Tr. 5798-5799). During Gitlow's testimony, panel chairman LaFollette questioned him as to whether he had discussed with Mandel the conduct of members of the panel (R. 295). Gitlow replied that he "would have discussed it with him" as a matter of course "because he is a friend of mine, over a long period of time, interested in the matters that I am interested in" (*ibid.*). A short while later in the hearing Mr. LaFollette stated that he resented the fact that the witness had discussed his conduct in the hearing room with Mandel; that it made him feel as if he were an elected "nisi prius judge" whose renomination was subject to the control of a "political boss". He added, however, that he realized that the fact of the conversations between the witness and Mandel did not "necessarily prove" that "there was an attempt by this device to intimidate me", and he stated that, in any event, the incident would not affect his conduct of the hearing and the carrying out of his "sworn * * * duty". He emphasized that he was speaking for himself only and that his "personal feelings" should not be imputed to his colleagues on the panel (R. 297-298). Later in the hearing, when an attempt was made to discover whether witness Kornfeder had also talked to Mandel about the panel members, Mr. LaFollette stated that, while he did not "retract from" his interrogation of Gitlow on that subject, he thought that that line of questioning had been

incorrect, and so he ruled against further pursuit of the subject (R. 347).

It is surely bare speculation to build from conversations between witnesses and a friend of thirty years' standing, who was employed by a subcommittee of the Senate Judiciary Committee, an attempt by the Judiciary Committee itself to intimidate Board members. The conduct of the members of the hearing panel as they conducted a proceeding then in progress was certainly a natural subject of conversation. As Gitlow said, he "would have discussed it" with Mandel as a matter of course "because he is a friend of mine" (R. 295). Mr. LaFollette himself, as we have seen, appreciated that the fact of these conversations was not proof of any attempt to intimidate him, and what is equally important, he observed that in any event he was not intimidated, and would continue to perform his sworn duty to conduct the hearings in an impartial manner. There is no indication whatever in this record of any word or act on the part either of Mandel, whom petitioner gratuitously describes as "McCarran's agent" (Br. 182), or of any committee member, designed to intimidate any member of the Board. Certainly, there is nothing in all this to show that any Board member was intimidated.⁸⁸

⁸⁸ The statement of Mr. LaFollette which petitioner quotes at Br. 182-183 does not, when read in context, bear out petitioner's contention. Petitioner attaches a different

Petitioner has made no showing of prejudice which would invalidate the carefully considered order of the Board entered nearly two years after the members' final confirmation. Particularly is this so in view of the fact that judicial review of the Board's order was not limited to determining that there was some substantial evidence supporting it, but amounted in effect to *de novo* consideration of the evidence and the ascertainment that the order was supported by the preponderance of the evidence (see Op. 43, 75-

meaning to the statement from that intended by Mr. LaFollette. The facts are as follows: One of the Attorney General's witnesses, Kornfeder, had been angered by charges and insinuations on the part of petitioner's counsel, Mr. Marcantonio, that he had committed certain crimes, and he had addressed certain remarks to Mr. Marcantonio (R. 341). Mr. LaFollette became provoked with the witness after a colloquy with him and referred to him as "contumacious" (R. 340-341). One of the counsel for the Attorney General thereupon made an apology in the witness's behalf, which Mr. LaFollette accepted (R. 341). A short while later, however, another colloquy occurred, in which Mr. LaFollette admonished the witness and stated that he would ask the Board to authorize him to request a contempt citation against the witness unless the latter apologized within two minutes (R. 342). Thereupon, another of the attorneys for the Attorney General attempted to apologize for the witness (*ibid.*). Mr. LaFollette then made an extended statement regarding the necessity of conducting an orderly hearing, in which he expressed the view that the panel had the power to order a contumacious witness from the hearing room and to strike his testimony from the record (R. 342-344). Panel member McHale stated that she concurred in Mr. LaFollette's statement (R. 344), but member Brown stated that,

76, R. 2126, 2152-2153). See *supra*, pp. 210-211. Cf. *National Labor Relations Board v. Air Associates*, *supra*, 121 F. 2d at 588; *Standard Distributors v. Federal Trade Commission*, 211 F. 2d 7, 11-12 (C. A. 2); *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C. A. 3), certiorari denied, 319 U. S. 751.

B. PETITIONER'S MOTIONS TO DISQUALIFY MEMBERS McHALE AND BROWN FOR ALLEGED PERSONAL BIAS AND PREJUDICE WERE PROPERLY DENIED

Petitioner contends (Br. 183-185) that the Board erred in denying (R. 190-196, 209-211) its motions to disqualify members McHale (R. 187-190) and Brown (R. 196-199) for alleged bias and prejudice against it. The contention is without merit in either respect.

while he agreed that orderly procedure must be maintained at all times, he could not, in the light of all the circumstances, share Mr. LaFollette's views with regard to the conduct of the particular witness then testifying (R. 344). Evidently provoked at this, Mr. LaFollette on the following day sought to resign as chairman of the panel (R. 346). In doing so he made a statement, which included the excerpt quoted by petitioner, in which he referred to the dissent of Mr. Brown of the day before, as the reason for his resignation (R. 345-346). Mr. LaFollette was nevertheless retained as chairman (R. 346-347), and, in fact, overruled petitioner's motion to discontinue further proceedings because of this incident (R. 347). If this incident has any pertinence to the instant argument, it is to show the independence of mind of the panel members.

1. With respect to member McHale

On November 15, 1951, during the pendency of the hearings in this case, panel member McHale made a short speech (R. 193-196) at a club luncheon (R. 191). In the speech Dr. McHale referred briefly to the history of the Subversive Activities Control Act and the function of the Board as provided for in the Act, summarized the Act's registration provisions and the contents of the Attorney General's petition in this case, mentioned the number of exhibits thus far filed and the number of pages of testimony thus far taken, pointed out that the hearings were open to the public, and invited the members of her audience to attend (R. 191-192, 193-196). On the basis of this speech, petitioner moved that Dr. McHale be disqualified from further participation in the case on the ground that she had prejudged the issues (R. 187-190). The Board denied the motion (R. 190-192) on the ground that the speech, a copy of which appears in the record at R. 193-196, "fails to indicate bias, prejudice or prejudgment" (R. 192). The Board's memorandum opinion stated that the affidavit of bias and prejudice (R. 187-190) attached to petitioner's motion "consists of extracting expressions from Dr. McHale's speech and importing to them a meaning which, in our opinion, is unjustified when such words are read in the context of the speech as a

whole" (R. 192). We submit that this action was correct.

Dr. McHale's reference in her speech to the Hitler-Stalin Pact (R. 193-194), which petitioner claims involved a prejudgment of the issue of "non-deviation" (Br. 183), was merely an explanation of what had moved Congress to act, not an explanation of her own belief. Her references to legislative facts incorporated in § 2 of the Act (*e. g.*, the congressional finding that a world Communist movement exists (R. 194)), and to the contents of the pleadings (R. 195), as well as her explanation of the then present status of the case (R. 195-196) and of the consequences of an order directing an organization to register (R. 196), are a neutral account of publicly known facts. Her statement, "What the outcome will be is anyone's guess" (R. 196), scarcely shows prejudgment of the issues, and her reflection to the effect that "catch[ing] the rabbit" is necessary before one may have "rabbit stew" (R. 196) involved at most an observation that before petitioner could be ordered to register there had to be clear proof that it was a Communist-action organization as defined in the Act. This statement was admittedly true, and the fact that it was couched as a figure of speech does not establish that Dr. McHale did not consider such proof necessary. On the other hand, she doubtless felt that her audi-

ence might need to be reminded that the Act required proof that the "Communist Party" was a "Communist organization". There is no warrant for petitioner's contention that this statement by Dr. McHale "indicated her view that the hearing was merely a formality" (Br. 183).

Dr. McHale thus was not shown on the basis of her remarks to have been biased against petitioner, so as to be unable to accord it a fair hearing. Although each case must be decided on its own merits, we submit that the situation at bar does not approach that considered by this Court in the last *Morgan* case (*United States v. Morgan*, 313 U. S. 409), where, notwithstanding the "strong views" expressed by the Secretary of Agriculture in his letter criticizing the earlier adverse decision of this Court, it was stated at page 421:

But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-Amer-

ican litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

Moreover, Dr. McHale was but one member of a unanimous Board which made its findings on the basis of overwhelming testimonial and documentary evidence and which issued a report carefully detailing that evidence. Even were petitioner's assumptions correct, therefore, they would hardly be material. Furthermore, what we said above (*supra*, pp. 269-270) applies with equal pertinency here. That is, the fact that the judicial review of the Board's findings by the court below—to which petitioner imputes no bias—amounted in effect to *de novo* consideration of the evidence and led to its decision that the Board's order was supported by a preponderance of that evidence (see Op. 49, 75-76, R. 2126, 2152-2153; cf. cases cited *supra*, p. 270) makes the question of Dr. McHale's freedom from bias irrelevant at this time.

2. *With respect to member Brown*

Board member Brown, as we have said, was one of the members of the hearing panel which heard the evidence and issued the recommended decision. The hearings ended on July 1, 1952 (R. 2), and panel members Brown and McHale issued their findings of fact and recommended decision on October 20, 1952 (R. 2). On November 16, 1952, more than four months after the taking of evidence had been concluded, and approximately one month after he and Dr. McHale had issued their findings and recommended decision, Brown appeared as a guest on a television-radio program (R. 206).

During this program, Brown summarized briefly the provisions of the Act administered by the Board, described the functions of the Board and the issues in the present proceeding, and related several of the findings contained in the recommended decision which he and Dr. McHale had issued (R. 207). He stated that a definite showing had been made under each of the eight evidentiary heads provided in the Act for the determination of a Communist-action organization, and announced his belief that petitioner would appeal from the Board's decision in the event that the Board should accept the panel's recommended decision and order petitioner to register (R. 207-208). He stated, in referring to the hearing panel's findings of fact and recom-

mended decision, that this was the first time that petitioner had been labeled for what it was, an instrumentality of a foreign government, and, in alluding to specific findings in the recommended decision, he related, in accordance with those findings, that petitioner had not deviated in its positions from those of the Soviet Union (R. 208). He stated specifically during the program that he could not speak for the Board, which had to make the ultimate decision in the case (R. 208).

Petitioner, on the basis of Brown's appearance and statements in the television-radio program as above described, moved that he be disqualified from further participation in the case (R. 196-198). The Board, after the filing of an affidavit by Brown (R. 206-208) in which he gave the details of his appearance and statements as above summarized, denied the motion (R. 209-211), observing, *inter alia*, that the program in question took place after Brown and Dr. McHale had issued their recommended decision (R. 210). We submit that this denial was correct. It scarcely amounts to bias and prejudice for Mr. Brown to have repeated publicly what he had already made a matter of record—that on the evidence he had heard he believed petitioner to be a Communist-action organization within the meaning of the Act. He simply repeated the substance of the panel's findings already made and published. Petitioner's argumentative characterization of

Mr. Brown's remarks (see Br. 183) is unwarranted. An expression of judgment on the basis of evidence already in and already evaluated does not show bias, and is not comparable to the general expressions of opinion announced before evidence was taken in *Federal Trade Commission v. Cement Institute*; 333 U. S. 683, 700-703, which this Court nevertheless held did not preclude the members of the Commission from hearing the evidence with open minds.⁸⁷

V

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE BEFORE THE BOARD

Petitioner contends (Br. 212-216) that the court below erred in denying (R. 2077) its motion (R. 2053-2055) for leave to adduce additional evidence before the Board. The pertinent facts are as follows:

On August 11, 1954, while the case was pending before the Court of Appeals following submission on briefs and oral argument but before the rear-

⁸⁷ See also our observations, made with respect to the alleged bias of Dr. McHale (*supra*, p. 274), but having equal pertinency here, *viz*, that the question of one member's alleged bias loses relevance in the light of the unanimity of the Board's final findings and order, and the virtual *de novo* consideration given to those findings by the court below, which found them to be supported by the preponderance of the evidence.

gument (see *supra*, pp. 10-11), petitioner filed in the Court of Appeals a motion (R. 2053-2055) for leave to adduce additional evidence before the Board. The motion alleged that petitioner was in possession of newly discovered evidence that the testimony of three of the Government's witnesses (Paul Crouch, Manning Johnson, and Harvey Matusow), on which testimony the Board was alleged to have relied "extensively and heavily" in making its findings of fact, was perjurious (R. 2054). In a supporting affidavit (R. 2055-2064), it was pointed out that the Board, as reflected in its annotated Report, "supported its findings of fact with thirty-six separate references to the testimony of Crouch, twenty-five separate references to the testimony of Johnson and twenty-four separate references to the testimony of Matusow" (R. 2055). An appendix (R. 2065-2066) to the affidavit, listed in tabular form the instances in which the Board made reference to the testimony of the witnesses in question and the subject-matter of the testimony in each instance. The affidavit recited a number of "illustrative" examples of "the importance which the [Board] attached to their testimony" (R. 2056). The balance of the affidavit (R. 2056-2064) was devoted to a statement of the reasons for the affiant's belief that the witnesses in question, all former

members of the Communist Party, had testified falsely. The support for the motion consisted in substance of assertions that the three witnesses had testified falsely on other occasions (R. 2059-2064).

In a memorandum in opposition to the motion (R. 2067-2076), the Board stated that (R. 2070-2071):

Contrary to the impression which the petitioner seeks to convey by its moving papers, the testimony of Paul Crouch, Manning Johnson, and Harvey Matusow was not of decisive importance at the hearing. Their testimony can be ignored in toto and the ultimate determination of the Board will remain amply supported by evidence both testimonial and documentary in character. The case presented by the Attorney General is supported by the testimony of twenty⁸⁸ witnesses and by more than four hundred and sixty documents. It is apparent from the record and from the Annotated Report of the Board that the result reached would be the same without the testimony of Crouch, Johnson, and Matusow.

The memorandum then proceeded to analyze the "illustrative examples" cited by petitioner as alleged proof of the importance of these three witnesses' testimony to the Board's findings (R. 2071-2074). On the basis of this analysis it was

⁸⁸ Of the twenty-two witnesses presented by the Attorney General, two, Carrington and Logofet, were "technical witnesses" (see R. 134-136 [2045-2048]).

pointed out (R. 2071) that, with but one exception,⁸⁹—

* * * even these “illustrative” examples, which it is reasonable to assume constitute the petitioner’s principal showing, are amply supported by other credible evidence of record * * *.”

Similarly, with reference to the tabular listing of the instances in which the Board had referred

⁸⁹ The single exception was Matusow’s testimony regarding an instance of financial aid ~~from the Soviet Union~~ to petitioner in the year 1949 (R. 2074). It should be noted that the Board did not rely heavily on any of the “financial aid” evidence in reaching its ultimate factual conclusion that petitioner is a Communist-action organization (see fn. 65, *supra*, p. 217).

⁹⁰ It will suffice here to make specific reference to but one of the petitioner’s “illustrative examples.” According to petitioner, the Board “relied heavily on the testimony of Johnson for its findings that * * * the first and only allegiance of Communists is to the Soviet Union, and that in the event of war between the United States and the Soviet Union it would be the duty of every Communist to help defeat the United States” (R. 2056). As pointed out in the Board’s reply memorandum, however, “In its Annotated Report, the Board devoted eighteen pages to the subject of allegiance, culminating in the finding that the leaders and members of the Communist Party ‘consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union.’ (Annotated Report, pp. 215–233 [R. 2016–2034]). This finding and the subsidiary findings pointed to by the petitioner are based upon extensive and varied testimonial and documentary evidence, as the briefest glance at the cited pages of the Annotated Report will show. That the contribution of Johnson’s testimony is merely cumulative and corroborative and in no sense necessary to the findings cannot reasonably be disputed. It was not heavily relied on” (R. 2073).

For the other “illustrative examples” and the Board’s analysis of them, see R. 2056, 2071–2074.

to the testimony of the witnesses in question (see p. 278, *supra*), the Board's memorandum pointed out that (R. 2075):

Investigation of the individual references in the appendix demonstrates that in most instances they are accompanied by citations to the testimony of other witnesses and to documentary evidence in substantiation of the same point. In most instances, the citations to Crouch, Johnson, or Matusow could be stricken and ample authority would remain. * * * Beyond showing that the testimony of the three witnesses in question was used by the Board in its Report, the tabulation proves nothing.

The Board's memorandum concluded as follows (*ibid.*):

It should be borne in mind that the conclusion of the Board that the petitioner is a Communist action organization, as defined in section 3 of the Internal Security Act of 1950, is arrived at on the basis of a number of subsidiary findings which comport with the criteria set forth in section 13 (e) of the Act. These subsidiary findings in turn depend upon a vast number of individual findings of fact. Were the testimony of Paul Crouch, Manning Johnson, and Harvey Matusow entirely absent from the record, a relative few of the myriad individual findings might be disturbed. The effect could be no greater.

It is nonsense to maintain that the result would be in any way changed. The petitioner would still be found a Communist-action organization by overwhelming evidence. A hearing should not be reopened for the reception of evidence which could not change the result. *National Labor Relations Board v. J. S. Popper, supra* [113 F. 2d 602 (C. A. 3)]; cf. *United States v. Thompson, supra* [188 F. 2d 652 (C. A. D. C.)]⁹¹

On December 23, 1954, the motion for leave to adduce additional evidence was denied without opinion, in an order entered simultaneously with the judgment affirming the order of the Board (R. 2077).

Petitioner contends that the Court of Appeals' refusal to remand the cause to the Board for the adduction of additional evidence was a violation of § 14 (a) of the Act (Br. 212-216). Section 14 (a) provides in pertinent part:

* * * If either party shall apply to the court for leave to adduce additional evi-

⁹¹It was also pointed out in the memorandum that, under the authorities, where alleged newly-discovered evidence relates solely "to the issue of credibility and not to any fact at issue," a hearing should not be reopened for its reception (R. 2068); and that each of the three witnesses in question had been cross-examined at length at the hearing before the Board, mostly on collateral matters (R. 2070). Hence, it was argued, "[f]urther evidence of a collateral nature and further cross-examination on collateral matters would be cumulative and would accomplish nothing" (*ibid.*).

dence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. * * *

Such applications are addressed to the sound judicial discretion of the court. This was emphasized by this Court in the very case relied on by petitioner, viz, *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9 (at 16); see also *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100, 104. Both these decisions so held with respect to the practically identical provision of the National Labor Relations Act. That the Court of Appeals did not abuse its discretion in denying the motion in this case is evident, we submit, from the facts as above outlined (*supra*, pp. 277-282). The Board had unanimously found, "[u]pon the overwhelming weight of the evidence in this proceeding," that petitioner "is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement" and "operates primarily to advance the objectives of such world Communist movement" (R. 132 [2042])—a finding which brought petitioner within the definition of a "Communist-action organization" under § 3 (3) of the Act.

The only question before the Court of Appeals on the motion for leave to adduce additional evidence—even phrasing the issue in the language adopted by petitioner (see Br. 214)—was whether there was any reasonable possibility that the Board might come to a different conclusion if the case were remanded and further evidence taken.⁹² That there was no such possibility was

⁹² The motion may be analogized to a motion for a new trial on the ground of newly discovered evidence. Where the newly discovered evidence consists of evidence that a prosecution witness gave false testimony at the trial, a new trial should be granted only if the court is satisfied that the testimony was material and false and that “without it the jury *might* have reached a different conclusion.” *Larrison v. United States*, 24 F. 2d 82, 87 (C. A. 7); *United States v. Johnson*, 142 F. 2d 588, 591 (C. A. 7), petition for certiorari dismissed, 323 U. S. 806; *United States v. Johnson*, 149 F. 2d 31, 44 (C. A. 7), reversed on other grounds, 327 U. S. 106; *Gordon v. United States*, 178 F. 2d 896, 900 (C. A. 6), certiorari denied, 339 U. S. 935; *United States v. Flynn*, 130 F. Supp. 412, 422 (S. D. N. Y.).

In the ordinary case—i. e., where the newly discovered evidence consists of something other than alleged perjury—a stricter test is employed. In such cases, the decisions hold, the court should not order a new trial unless it is convinced that consideration of the new evidence by the jury at a new trial would *probably* result in a different verdict. *Brandon v. United States*, 190 F. 2d 175, 178 (C. A. 9); *Thompson v. United States*, 188 F. 2d 652 (C. A. D. C.); *Heald v. United States*, 175 F. 2d 878, 883 (C. A. 10), certiorari denied, 338 U. S. 859; *Weiss v. United States*, 122 F. 2d 675, 691 (C. A. 5), certiorari denied, 314 U. S. 687; *Johnson v. United States*, 32 F. 2d 127, 130 (C. A. 8); *United States v. Hiss*, 107 F. Supp. 128, 136 (S. D. N. Y.), affirmed, 201 F. 2d 372 (C. A. 2), certiorari denied, 345 U. S. 942; see *United States v. John-*

convincingly demonstrated by the Board's opposing memorandum, summarized above (pp. 279-282). Consequently, it was a proper exercise of judicial discretion for the court below to decline to remand the case for further proceedings which it knew could not affect the final result.

VI

THE BOARD WAS AT ALL TIMES PROPERLY CONSTITUTED SINCE THE ORIGINAL RECESS APPOINTMENTS OF ITS MEMBERS WERE VALID UNDER THE CONSTITUTION AND CONFIRMATION OCCURRED BEFORE THE EXPIRATION OF THE NEXT SESSION OF CONGRESS.

Petitioner contends that the order of the Board requiring it to register is invalid on certain technical grounds relating to the constitutional recess-appointment power of the President (Br. 185-191). It is contended that three of the four members who signed the order had not been validly appointed to the Board during a portion

son, 327 U. S. 106, 110, fn. 4. This is also the uniform rule in the states. See Brief for the United States in *Griffin v. United States*, No. 417, Oct. Term, 1948, p. 20, fn. 6, where the state cases are collected. In the *Griffin* case, the Government suggested that where the offense in question is of a serious type, and particularly in a capital case (like *Griffin*), the "probability" rule might place too heavy a burden on the defendant and that the proper rule should be that of "reasonable possibility" (Br. 21)—a suggestion which this Court apparently accepted (see *Griffin v. United States*, 336 U. S. 704, 709), as did the dissenting opinion explicitly (at 724).

of the time in which they sat on the case, though it is conceded that even these three, having eventually been duly confirmed, were lawful members during most of the hearings as well as when the order under review was issued (Br. 185, 189-190). We submit that none of the various arguments advanced has merit and, further, that even if one or more were sound it would make no difference in the circumstances of this case.

Petitioner's challenge relates to the recess appointments of Board members Peter Campbell Brown, Kathryn McHale, and David J. Coddaira.⁹³ These three individuals, who were among the Board's original members, commenced their service on the Board as recess appointees under appointments dated October 23, 1950. Thereafter, the President in due course submitted their nominations to the Senate for confirmation, and they were confirmed on August 9, 1951. Petitioner concedes that all three of these appointments were in all respects valid and proper from and after the latter date (Br. 185, 189), which was more than 20 months prior to the entry of the order under review (April 20, 1953).

Petitioner's challenge relates to the 9-month period between the original recess appointments and Senate confirmation. It is argued, first, that

⁹³ No question is raised as to the validity of the appointment of the fourth member of the Board who signed the order, Watson B. Miller.

the recess appointments were invalid *ab initio* (Br. 186-188), and, alternatively, that, assuming their original validity, they expired on January 2, 1951, with the expiration of the Second Session of the 81st Congress (Br. 188-189). Under the former view the appointees served illegally during the whole 9-month period between their appointment and Senate confirmation. Under the latter view there was a hiatus in their membership from January 2, 1951, until their confirmation on August 9, 1951. Under either view, it is urged, they were "usurpers" (Br. 189, 190, 191) at least between the two latter dates, during which period proceedings were conducted by the Board, including the beginning of the taking of testimony before a panel which included two of the members in question.

The court below found it unnecessary to pass upon the merits of these contentions (Op. 47-48, R. 2124-2125) since it determined that, regardless of the validity of the appointments of the panel-members when the hearings were commenced, the membership of the Board at the time it finally made its findings and conclusions and issued its order was unquestionably properly appointed and confirmed. Whether or not the panel was originally properly made up would not affect the validity of the final order, the court believed, since the evidence could have been taken

by a hearing examiner (§ 13 (c) of the Act." This disposition of the issue would make it unnecessary to untangle the several complicated arguments propounded by the petitioner with respect to recess appointments. However, since this Court might prefer to dispose of this issue on the merits, we proceed to a detailed analysis of the issues and to show that the recess appointments were valid when made and did not expire prior to the final Senate confirmation.

The pertinent facts are as follows:

On September 23, 1950, the Second Session of the 81st Congress enacted the Internal Security Act by passing it over a Presidential veto (see 64 Stat. 1031) and adjourned on the same day pursuant to a concurrent resolution of both Houses to a day certain, namely, November 27, 1950 (96 Cong. Rec. 15726). On October 23, 1950, the President, by recess appointments, appointed five members to the Board, including Brown, McHale,

⁹⁴ At most, petitioner only challenges the *de jure* status of the Board members prior to their confirmation. It is not disputed that they had at least *de facto* status throughout that period; that, in other words, they held valid offices under color of right thereto. Cf. *Hussey v. Smith*, 99 U. S. 20, 24; *Ball v. United States*, 140 U. S. 118, 128-429; *McDowell v. United States*, 159 U. S. 596, 601-602; *Starr v. United States*, 164 U. S. 627, 631; *Ex parte Henry Ward*, 173 U. S. 452, 454-456; *United States ex rel. Doss v. Lindsley*, 148 F. 2d 22 (C. A. 7), certiorari denied, 325 U. S. 858; *Cardoza v. Baird*, 30 App. D. C. 86; Morganston, *The Appointing and Removal Power of the President of the United States*, S. Doc. No. 172, 70th Cong., 2d sess., pp. 134-135.

and Coddairé. On November 27, 1950, the Second Session of the 81st Congress reconvened pursuant to the resolution of adjournment, and the President transmitted to the Senate his nominations of the Board members (96 Cong. Rec. 15785). On January 2, 1951, the Second Session of the 81st Congress adjourned *sine die* (96 Cong. Rec. 17121, 17138) without the Senate having acted on the nominations. On the following day, January 3, 1951, the First Session of the 82d Congress convened, and on February 12, 1951, the President resubmitted the nominations to the Senate for confirmation (97 Cong. Rec. 1228). On August 9, 1951, the nominations were confirmed (97 Cong. Rec. 9702). Throughout the foregoing period, proceedings relating to petitioner were being conducted before the Board, including the filing of the Attorney General's petition on November 22, 1950, the filing of petitioner's original and amended answers on February 14, and April 3, 1951, respectively, and the beginning of the hearings on April 23, 1951. The hearing panel was composed originally of Board members Brown, McHale, and one other, and eventually of Brown and McHale alone.⁹⁵

(*Supra*, p. 7.)

⁹⁵ As we have pointed out, the panel was reduced to two (Brown and McHale) when the third member, Mr. La Follette, failed to be confirmed by the Senate during the First Session of the 82d Congress. (*Supra*, pp. 7, 262-263.)

A. THE RECESS APPOINTMENTS WERE VALID WHEN MADE

The "recess appointment" clause of the Constitution (Art. II, § 2, cl. 3), pursuant to which the Board members in question were originally appointed on October 23, 1950, provides:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Petitioner's contention that the recess appointments in question were invalid from the beginning is based on three alternative arguments. First, it is claimed, no "vacancies" had "happened" on the Board within the meaning of the provision (Br. 186). Secondly, the vacancies, if they "happened" at all, did not happen during a "Recess of the Senate" (Br. 186-187). Thirdly, the vacancies were not "filled up"—i. e., the appointments were not made—during a "Recess of the Senate" (Br. 187-188).

Preliminarily, it should be noted that neither the debates at the Constitutional Convention nor any of the contemporaneous materials shed any additional light on the terse language of the pertinent clause of the Constitution in any respect here relevant.

1. "Vacancies" on the Board "happened" within the meaning of the recess appointment clause when the Board came into being upon the enactment of the Act

When the recess appointments here challenged were made, the Subversive Activities Control Board had just been created by law, so that the positions to which the appointees were named had had no prior occupants. Petitioner argues that the power of the President to make recess appointments is limited by the language of the constitutional provision to the filling of vacancies resulting from the "death, resignation, promotion or removal" of prior occupants of the offices to be filled, and does not extend to the filling of newly-created offices (Br. 186). No vacancy "happens" in the constitutional sense, it argues, when an office is newly created by law.⁹⁶

⁹⁶ The array of authorities presented by petitioner to support its position (Br. 186-187) fades on analysis. The two senatorial expressions relied upon by Story appear to be more concerned with the power of the President to create a new office during a Senate recess than with the power to fill offices created by Congress. The district court opinion, *Schenck v. Peay*, 21 Fed. Cas. 672 (E. D. Ark.), and the various constitutional authorities, seem to confuse this issue with that dealt with under the next heading, whether the vacancy must first occur during a recess. The opinion in the *Schenck* case relies primarily on Judge Cadwalader's opinion in *Case of District Attorney of United States*, 7 Fed. Cas. 731 (E. D. Pa.), which is the main support for petitioner's argument on the next point, but has no relevance to this issue. The two very early opinions of Attorneys General, the first of which is pure *dictum*, are discredited by the later opinions cited below (pp. 292-293).

It is obvious, however, that petitioner's construction would frustrate to an important degree the very purpose of the Constitutional provision, which is to enable the business of government to be carried on by temporary appointments during periods when the Senate is not available to act on nominations to office. Nor is it required by the common or dictionary meaning of the word "vacancy." "Vacancy," as used with respect to an office, means the state of the office "when vacated or vacant;" "vacant," in turn, means "[n]ot filled or occupied by an incumbent, possessor, or officer" (Webster's *New International Dictionary* (2d ed.)). Hence an office which, being newly created, has never had an incumbent is "vacant" until filled. *People v. Hylan*, 212 N. Y. 236 (1914); *Richardson v. Young*, 122 Tenn. 471, 551 (1909); *Condon v. Maloney*, 108 Tenn. 82, 101 (1901); *Walsh v. Commonwealth*, 89 Penn. St. 419 (1879); 12 Op. Atty. Gen. 455 (1868); 18 Op. Atty. Gen. 28 (1884); 19 Op. Atty. Gen. 261 (1889); Morganston, *The Appointing and Removal Power of the President of the United States*, S. Doc. No. 172, 70th Cong., 2d sess., p. 116.

The reasons which prompted the framers of the Constitution, out of a wise foresight, to confer on the President the power to fill vacancies in the Senate's absence by granting temporary commissions are as pertinent in the case of offices which lack incumbents because newly created as

in the case of those which lack incumbents because of the death, resignation, or removal of previous occupants. "I am unable to discriminate," wrote Attorney General Evarts in 1868, "between cases of continuing vacancy in the recess of the Senate, which originate during the session by the new creation of the office, and those which so originate by a lawful termination of an incumbency. Certainly the need of the official service in the public interest is presumptively as great in one case as the other, and the executive duty of the President, for the discharge of which this constitutional power is vested in him, is not qualified by the circumstance that the office is to be filled for the first time" (12 Op. Atty. Gen. 455, 457). Similarly, Attorney General Miller, in advising President Harrison in 1889 that he had the power to make a recess appointment to an office newly created by law, observed that "the word 'vacancy' in the Constitution * * * signifies the condition where an office exists, of which there is no incumbent. It is used without limitation as to how the vacancy comes to exist" (19 Op. Atty. Gen. 261, 263). To the same effect, see 18 Op. Atty. Gen. 28 (1884); 26 Op. Atty. Gen. 234 (1907); Morganston, *op. cit. supra*, p. 116.

2. *The vacancies happened during a "Recess of the Senate" within the meaning of the recess appointment clause*

Petitioner next argues that, since the vacancies on the Board arose simultaneously with the pas-

sage of the Act on September 23, 1950, while the Senate was still in session, they did not happen "during the Recess of the Senate;" hence, according to the argument, the President lacked power under the terms of Article II, § 2, clause 3 to fill the vacancies by recess appointments, even though, as we have pointed out (*supra*, p. 228),²⁸⁸ the Senate adjourned later that very day (Br. 186-187).

This prong of petitioner's argument is equally invalid. See 2 Watson, *The Constitution of the United States* (1910), pp. 988-990; 2 Tucker, *The Constitution of the United States* (1899), p. 741. The true meaning of the constitutional clause—the one which alone comports with its evident sense and spirit—is that the President may make recess appointments to fill vacancies which *happen to exist* during a Senatorial recess even though they may have come into existence while the Senate was in session. This construction has the support of Madison himself, who played so prominent a role in the drafting of the Constitution (4 *Letters and Other Writings of James Madison* (1865), p. 351). Madison's view was expressed in 1834. The same interpretation had been adopted even earlier, in 1823, by Attorney General Wirt, apparently without Madison's knowledge. In a cogently-reasoned opinion rendered for President Monroe, Wirt wrote (1 Op. Atty. Gen. 631, 633):

Now, if we interpret the word "*happen*" as being merely equivalent to "*happen to*

exist," (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished.

* * * In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission.

This seems to me the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language. And these, I think, are the governing points to which all sound construction looks.

The same conclusion was reached in 1832, in another carefully reasoned opinion, by Attorney General (later Mr. Chief Justice) Taney (2 Op. Atty. Gen. 525), and the view has since been repeatedly reaffirmed over the years. 3 Op. Atty. Gen. 673 (1841); 4 Op. Atty. Gen. 523 (1846); 7 Op. Atty. Gen. 186, 223 (1855); 10 Op. Atty.

Gen. 356 (1862); 12 Op. Atty. Gen. 32 (1866); 12 Op. Atty. Gen. 449 (1868); 12 Op. Atty. Gen. 455 (1868); 14 Op. Atty. Gen. 562 (1875); 15 Op. Atty. Gen. 207 (1877); 16 Op. Atty. Gen. 522 (1880); 16 Op. Atty. Gen. 538 (1880); 18 Op. Atty. Gen. 29 (1884); 19 Op. Atty. Gen. 261 (1889); 26 Op. Atty. Gen. 234 (1907); 30 Op. Atty. Gen. 314 (1914); 33 Op. Atty. Gen. 20 (1921). Attorney General Daugherty, in the last-cited opinion, was able to describe Attorney General Wirt's opinion of 1823, *supra*, as having been followed "with practically unbroken unanimity"⁹⁷ (33 Op. Atty. Gen. at 22). The executive interpretation is thus a firmly settled one, practically spanning the nation's history. It

⁹⁷ Only two opinions to the contrary, both very early, have been discovered: 2 Op. Atty. Gen. 333, 334 (1830); 4 Op. Atty. Gen. 361, 363 (1845). Neither makes reference to the earlier opinion of Attorney General Wirt, nor does either analyze the issue or advance reasons for the conclusion reached. The 1845 opinion was limited to cases of vacancies which are "known to exist during the session of the Senate" and which nevertheless are not filled in the ordinary manner, *i. e.*, nomination by the President and confirmation by the Senate (4 Op. Atty. Gen. at 363). It is evident that the rationale of the latter opinion would not apply to the case at bar, where the Senate adjourned on the very day on which the vacancies arose. Moreover, Attorney General Mason, who rendered the 1845 opinion, in effect reversed himself in a more elaborate opinion written in the following year (4 Op. Atty. Gen. 523, *supra*), in which he expressed "general concurrence with his three predecessors [*i. e.*, Wirt, Taney, and Mr. Legare, the author of 3 Op. Atty. Gen. 673, *supra*]" (12 Op. Atty. Gen. 32, *supra*, at 33).

rests, furthermore, as we have seen, on the most cogent of reasons.⁹⁸ Such an interpretation "on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U. S. 655, 690.

This firmly settled executive interpretation has also received judicial support. *In re Farrow*, 3 Fed. 112 (C. C., N. D. Ga., 1880).⁹⁹ In that case Circuit Judge (later Mr. Justice) Woods pointed out that ten different Attorneys General, commencing with Attorney General Wirt in 1823 (*supra*, pp. 294-295) and continuing down to the then Attorney General Devens in 1880, had all agreed that the recess appointment power extends to the filling of vacancies which, while first occurring during a session of the Senate, continue to exist during the Senate's recess. He then considered the opposing view of District Judge Cadwalader, expressed in *Case of District Attorney of United States*, 7 Fed. Cas. 731 (E. D.

⁹⁸ As observed, moreover, by Attorney General Stanbery in 12 Op. Atty. Gen. 32, *supra*, if a "verbal construction" of the recess appointment clause were sound, a vacancy which occurred during a recess might "be filled by the President without the consent of the Senate whilst the Senate is in session; but no one maintains that position" (at 39).

⁹⁹ Cf. *In re Yancey*, 28 Fed. 445 (C. C., W. D. Tenn., 1886).

Pa., 1868), on which petitioner relies (Br. 187, fn. 110). Circuit Judge Woods pointed out that this was the sole authority to the contrary¹⁰⁰ and stated that it "ought not to be held to outweigh the authority of the great number which are cited in support of the opposite view," the practice of the executive department for nearly 60 years, "and the acquiescence of the senate therein" (3 Fed. at 115).

The reasonableness of this long-established executive practice and interpretation is peculiarly exemplified in this case, where the Senate adjourned later on the same day in which the vacancies arose. Obviously, it would have been a practical impossibility for the President to make nominations to fill the new offices and for the Senate to confirm the nominees prior to the hour set for adjournment.

3. *The appointments were made during a "Recess of the Senate" within the meaning of the recess appointment clause*

In the preceding point petitioner argued that the recess appointments in issue were invalid be-

¹⁰⁰ Indeed, as indicated in Judge Cadwalader's opinion, the only thing he appears actually to have decided was that, notwithstanding the numerous opinions by Attorneys General to the effect that the President has the power to make recess appointments under the circumstances in question, "the question, whenever directly litigated, will be quite open for judicial contestation" (7 Fed. Cas. at 744).

cause the vacancies did not *occur* during a Senatorial recess. In this point the argument is that the appointments were invalid because the vacancies were not *filled* during such a recess. The "Recess" referred to in the recess appointment clause, contends petitioner (Br. 187-188), refers exclusively to "the *sine die* recess between the annual sessions of Congress or between an annual and an extraordinary session" (Br. 188). That is to say, the term does not include "the interval between an adjournment of the Congress to a day certain and its next sitting date" (*ibid.*). This facet of petitioner's argument is also erroneous. IntraseSSIONAL adjournments to a day certain, if of substantial duration, as well as *sine die* adjournments between sessions, are recesses within the meaning of the constitutional clause. *Gould v. United States*, 19 Ct. Cl. 593, 595-596 (1884); *Case of District Attorney of United States*, 7 Fed. Cas. 731, 744 (E. D. Pa., 1868); 33 Op. Atty. Gen. 20 (1921).

It is true that there is language in Attorney General Knox's opinion in 23 Op. Atty. Gen. 599 (1901)—the sole authority cited by petitioner in support of its position (Br. 188)—to the effect that "the Recess" as used in the recess appointment clause refers only to *sine die* adjournments between sessions and does not extend to adjournments to a day certain within a session (23 Op. Atty. Gen. at 601). The only issue involved in that opinion, however, related to whether the

President had the power to make a recess appointment during a short holiday adjournment of the Senate,¹⁰¹ the opinion concluding that he did not. However, a subsequent opinion by Attorney General Daugherty, which reviewed all the authorities to date, while not disagreeing with Attorney General Knox's decision on its facts (*i. e.*, that brief holiday or other very short adjournments are not recesses within the meaning of the constitutional clause), dissented from, and in effect overruled, the latter's broad generalization to the effect that *no* intrasessional adjournment to a day certain can constitute such a recess. 33 Op. Atty Gen. 20 (1921).

"It seems to me that the broad and underlying purpose of the Constitution," said this opinion, "is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained. Regardless of whether the Senate has adjourned or recessed, the real question, as I view it, is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained. To give the word 'recess' a technical and not a practical construction, is to disregard substance for form" (33 Op. Atty. Gen. at 21-22). After reviewing the long line of rulings of the Attorney General, to

¹⁰¹ The adjournment was from December 19, 1901, to January 6, 1902 (23 Op. Atty. Gen. at 602).

which we have already referred (*supra*, pp. 294-296), holding that the recess appointment power extends to vacancies happening while the Senate is in session and still remaining unfilled at the close of the session (at 22-23), and after pointing out that the sound reason for this construction is the continuing necessity that vacancies be filled to the end that the laws may be enforced, the opinion observed that the same reasoning compelled the conclusion that the power in question extends to periods of substantial duration in which the Senate, having in fact adjourned to a fixed date, is not (though the "session" technically continues) "sitting" in any practical sense of the term so as to be able to receive and act on nominations to office (at 23). The opinion concluded that (at 25):

[T]he essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor

of the validity of whatever action he may take. * * *

The Attorney General, in thus giving the recess appointment clause a soundly practical construction, was on eminently good ground. See *Wright v. United States*, 302 U. S. 583, 589-590, 592, 597, where this Court emphasized the necessity of giving a practical construction to the analogous "pocket veto" clause of the Constitution.¹⁰² Even District Judge Cadwalader—whose opinion in *Case of District Attorney of United States*, 7 Fed. Cas. 731 (E. D. Pa., 1868), is so strongly relied upon by petitioner with respect to the companion question of whether a vacancy occurring in a session but continuing into a recess may be filled by a recess appointment (see *supra*, pp. 297-298)—fails to support petitioner on the present point. "On every adjournment of congress," he said, "except such an occasional temporary one as does not suspend the course of business of the two houses, the interval until the next meeting should, I think, be deemed a recess" (at 744).¹⁰³

¹⁰² It is significant that the three-day adjournment of the Senate which was in issue in the *Wright* case is referred to throughout the Court's opinion as a "recess".

¹⁰³ Our position finds further support in the Report of the Senate Judiciary Committee presented March 2, 1905, in response to a Senate Resolution calling upon it to construe the recess appointment clause. This Report (S. Rep. No. 4389, 58th Cong., 3d sess., reproduced in full at 39 Cong. Rec. 3823-

Reason and authority thus unite with the natural usage of the language in compelling the conclusion that an intrasessional adjournment to a day certain, if of substantial duration, constitutes "the Recess" within the meaning of the recess appointment clause.

B. THE RECESS APPOINTMENTS DID NOT EXPIRE ON JANUARY 2, 1951; WITH THE EXPIRATION OF THE SECOND SESSION OF THE 81ST CONGRESS

Each of the points discussed thus far (*supra*, pp. 290-303) has related to the initial validity of the recess appointments in issue. Petitioner, in its final contention (Br. 188-189), assumes *arguendo* the appointments' initial validity and argues that they expired by operation of law on January 2, 1951, thus leaving a seven-month period—from January 3 to August 9, 1951, when the nominations were confirmed—during which, allegedly, the challenged members did not sit as of right. "[I]f," according to the argument, "the adjournment of Congress from September 23 to November 27,

3824 and in 5 Hind's *Precedents of the House of Representatives*, § 6687), while not addressed to the precise issue here involved; emphasizes that the word "recess" should be given its "ordinary" or "common and popular" sense. See also *The Pocket Veto Case*, 279 U. S. 655, 680; cf. Cannon's *Procedure in the House of Representatives* (1953 ed.), House Doc. No. 562, 82d Cong., 2d sess., p. 4, where an adjournment for more than three days (which, under Article I, § 5, clause 4 of the Constitution, neither House may take without the consent of the other) is described as a "recess."

1950 was 'the Recess,' then November 27 must have been the beginning of its 'next Session,' with the consequence, it is argued, that "the appointments expired on January 2, 1951 when the 'next session' ended with the *sine die* adjournment of Congress" (Br. 188).

This branch of petitioner's argument is also invalid. The sitting from November 27, 1950, to January 2, 1951, was a continuation or resumption of the same session—the Second Session of the 81st Congress—which had been interrupted by the two-month recess commencing September 23, 1950. Gilfry, *Senate Precedents*, 1789–1913, p. 30; 5 Hind's *Precedents of the House of Representatives*, §§ 6676–6686. The "next Session" was the First Session of the 82d Congress. That session began on January 3, 1951 (97 Cong. Rec. 3, 5) and did not end until October 20, 1951 (97 *id.* 13732, 13783). During it, on August 9, 1951, as we have seen, the Senate duly confirmed the regularly submitted nominations of the members whose tenure petitioner challenges (97 *id.* 9702). Since, according to the terms of the constitutional clause, recess appointments do not expire until "the End" of the "next Session," the recess appointments here in issue remained in full force at all times up to the point in this "next Session" when confirmation occurred, at which point the appointees commenced to serve under their regular or permanent appointments, thus leaving no

gap in their tenure. *Gould v. United States*, *supra*, 19 Ct. Cl. 593, 595-596; 23 Op. Atty. Gen. 599, 604 (1901); *cf.* 20 Op. Atty. Gen. 503 (1892).

There can be no doubt that the framers of the Constitution contemplated that a session of Congress could be interrupted by Congress' adjourning or recessing to a fixed date, and that on that day the same session would resume. This is clear from Article I, § 5, clause 4, which provides that "Neither House, *during the Session of Congress*, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting" [emphasis added]. It is a common occurrence for Congress, with the concurrence of both Houses, to adjourn for substantial periods of time "during the Session," with provision for reconvening after the recess. See 5 Hind's *Precedents of the House of Representatives*, §§ 6676-6686. This is precisely what the Second Session of the 81st Congress did in this case. For petitioner's argument to have merit, the reconvening of that Session on November 27, 1950, would have to be treated as if it were a special or extraordinary session of Congress, which under the Constitution (Article II, § 3) the President alone has the power to convene.

Petitioner's instant contention is refuted by the very opinion of the Attorney General on which it relied for its previous argument (see

supra, pp. 298-303) that an intrasessional adjournment is not a "recess" under the recess appointment clause, *viz.*, Attorney General Knox's opinion in 23 Op. Atty. Gen. 599 (1901). "If an adjournment during a session is a recess within the meaning of the clause of the Constitution in question," Attorney General Knox pointed out, "then the commission of an appointee of the President would extend in this case to the end of the Fifty-seventh Congress, as the Constitution provides that it shall extend to the end of the *next* session, not the session within which the recess occurs. The only theory to defeat such a conclusion would be that the reassembling of the Senate after each adjournment constitutes a new session, a position wholly untenable in view of the constitutional provision as to adjournments *during the session*" (at 604).

The sole authority which petitioner is able to cite in support of its present contention (Br. 188-189) is a *dictum* by District Judge Cadwalader in *Case of District Attorney of United States*, 7 Fed. Cas. 731, 744 (E. D. Pa., 1868). Judge Cadwalader stated that he was "incline[d] to think" that the recess appointment in question, if it had been valid initially (but he thought it had not, though his view on that point too was *dictum*, see fn. 100, *supra*, p. 298), would have expired when the Senate, having adjourned to a day certain within the session, reconvened and again adjourned on the same day to a still later date

within the session, *if*, further, the original resolution of adjournment had been worded differently from the way in which it was in fact worded. The tenuousness of this case as an authority needs no elaboration. We submit, moreover, that it cannot stand analysis in the light of the unambiguous terms of the Constitution. The Constitution, as we have pointed out (*supra*, p. 305), and as recognized by Attorney General Knox (*supra*, p. 306) and the Court of Claims in the *Gould* case (*supra*, pp. 304-305), clearly contemplates the possibility that a Session of Congress may recess temporarily from time to time to a specified date and reconvene on the date agreed upon, without thereby fragmentizing the Session into a number of particular "sessions."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

WILLIAM F. TOMPKINS,
Assistant Attorney General.

HAROLD D. KOFFSKY,
PHILIP R. MONAHAN,
Attorneys.

GEORGE R. GALLAGHER,
General Counsel,
Subversive Activities Control Board.

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